No. 669.

669.

FILED
MAY 13 1901
JAMES H. McKENNEY,
Clerk.

Record for mb. to vacate &c.

Filed May 13, 1901.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,* vs. THE FARMERS' LOAN AND TRUST COMPANY et al., *Defendants in Error.*	Writ of Error to Supreme Court of Illinois.

PRINTED RECORD FOR MOTIONS TO VACATE SUPERSEDEAS, DISMISS, &c.

HERBERT B. TURNER,
WILLIAM BURRY,
Solicitors for The Farmers' Loan and Trust Company, Defendants in Error.

The Standard Printing Company, 29 Jackson St., Chicago.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,* vs. THE FARMERS' LOAN AND TRUST COMPANY et al., *Defendants in Error.*	Writ of Error to Supreme Court of Illinois.

EXTRACTS FROM TRANSCRIPT OF RECORD, FOR CONSIDERATION ON MOTIONS.

MANDATE FROM THE SUPREME COURT OF THE UNITED STATES TO THE SUPREME COURT OF ILLINOIS.

UNITED STATES OF AMERICA } ss.

[Seal of Supreme Court of United States.]

The President of the United States of America, to the Honorable Judges of the Supreme Court of the State of Illinois, Greeting:

Whereas, lately in the Supreme Court of the State of Illinois, before you, or some of you, in a cause between

the Farmers' Loan and Trust Company, appellant, and the Lake Street Elevated Railroad Company, the American Trust and Savings Bank, and the Northern Trust Company, appellees, No 4,516, wherein the judgment of the said Supreme Court, entered in said cause on the 18th day of June, A. D. 1898, is in the following words, viz:

"And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious or defective, and that in that record there is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellees recover of and from the said appellant their costs by them in this behalf expended, and that they have execution therefor," as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeable to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-nine, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On reconsideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that the said appellant, the Farmers' Loan and Trust Company, recover against the said appellees one thousand one hundred and ninety-three dollars and forty-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

March 26, 1900.

And the same is hereby remanded to you, the said judges of the said Supreme Court of the State of Illinois, in order that said execution and further proceedings may be had in said cause, in conformity with the judgment and decree of this court above stated, as according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of May, in the year of our Lord one thousand nine hundred.

Costs of Appellant.—

Clerk.....	$ 484.95
Printing Record	688.50
Attorney	20.00
	$1,193.45

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

SUPREME COURT OF ILLINOIS,

April Term, 1901.

Order Reversing and Remanding.

And afterwards, on the 17th day of April A. D., 1901, certain proceedings were had and orders entered, among which is the following, viz:

The Farmers' Loan and Trust Company. *vs.* The Lake Street Elevated Railroad Company, The American Trust and Savings Bank, as trustee, The Northern Trust Company.	Appeal form Appellate Court of Illinois, First District. Remanded by U. S. Supreme Court.

And now on this day this cause coming on to be heard on motion of the Farmers' Loan and Trust Company to reverse the judgment of the Appellate Court and decree of the Superior Court and remand this cause, and it appearing to the court that the Supreme Court of the United States did on the 26th day of March, A. D. 1900, enter an order in this canse in the words and figures following:

United States of America.

To the Honorable Judges of the Supreme Court of the State of Illinois, Greeting:

Whereas, lately in the Supreme Court of the State of Illinois, before you, or some of you, in a cause between the Farmers' Loan and Trust Company, appellant, and

the Lake Street Elevated Railroad Company, the American Trust and Savings Bank, and the Northern Trust Company, appellees, No. 4,516, wherein the judgment of the said Supreme Court, entered in said cause on the 18th day of June, A. D. 1898, is in the following words, viz.:

"And now, this day, this cause having been argued by counsel, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious, or defective, and that in that record there is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellees recover of and from the said appellant their costs by them in this behalf expended, and that they have execution therefor," as by the inspection of the transcript of the record of the said Supreme Court which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-nine, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and

adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs.

And that the said appellant, the Farmers' Loan and Trust Company, recover against the said appellees one thousand one hundred and ninety-three dollars and forty-five cents, for its costs herein expended and have execution therefor.

And it is further ordered, that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court.

March 26, 1900.

And the same is hereby remanded to you, the said judges of the said Supreme Court of the State of Illinois, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this court, above stated, as according to right and justice and the constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of May, in the year of our Lord one thousand nine hundred.

Costs of appellant:

Clerk.....	$484 95
Printing record...	688 50
Atttorney.....	20 00
	$1,193 45

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Therefore, in obedience to said mandate and in compliance therewith, it is considered by the court that the judgment of the Appellate Court and decree of the Superior Court in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County, with directions to dismiss the bill.

And it is further considered by the court that the said appellant, Farmers' Loan and Trust Company, recover of and from the said appellees, Lake Street Elevated Railroad Company, the American Trust and Savings Bank and the Northern Trust Company its costs by it in this behalf expended, and that it have execution therefor.

MOTION OF LAKE STREET ELEVATED COMPANY TO FILE SUPPLEMENTAL TRANSCRIPT, ETC.

IN THE SUPREME COURT OF ILLINOIS.

April Term, A. D. 1901.

The Farmers' Loan and Trust Company, *Appellant*, *vs.* The Lake Street Elevated Railroad Company *et al.*, *Appellees.*	Appeal from Appellate Court, First District.

Now comes the appellee, the Lake Street Elevated Railroad Comany, by Knight & Brown and William C. Adams, its attorneys, and moves the court for leave to file a supplemental transcript of all proceedings had and documents filed in the above entitled cause in the Superior Court of Cook County, Illinois, since the 4th day of June, A. D. 1896, the date of the entry of the decree in said cause, which was affirmed by this court on the 18th day of June, A. D. 1898, excepting such matters as have been filed and entered of record in said cause, and are contained in the transcript of the record of the above entitled cause now on file in this court, being appeal bond, an order extending the time to file the certificate of evidence and the certificate of evidence, and also for leave to file a certified copy of an order entered by the Circuit Court of the United States for the Northern District of Illinois, Northern Division, in the case of *The Farmers' Loan and Trust Company* v. *The Lake Street Elevated Railroad Company et al.*, referring said cause to a

master in chancery for the sole and only purpose of determining the amount of compensation to be paid to the Farmers' Loan and Trust Company as trustee for its fees.

And for the ground of its said motion, this appellee shows to the court that the matters and things contained in said supplemental transcript are material to be considered on the hearing of the motion heretofore entered by the appellant, the Farmers' Loan and Trust Company, for a mandate to issue to the Superior Court of Cook County in accordance with the mandate of the Supreme Court of the United States, for the following reasons:

1. Because on the 24th day of June, 1898, after the certified copy of the order entered by this court affirming said decree of June 4, 1896, was filed in said Superior Court, the said Superior Court entered a supplemental decree appointing the Equitable Trust Company trustee, to fill the vacancy caused by the removal of the Farmers' Loan and Trust Company as trustee, and vesting in said The Equitable Trust Company all the rights, powers and privileges which had been vested in the Farmers' Loan and Trust Company under and by virtue of the provisions of the mortgage or deed of trust referred to in said original decree, and confirming the appointment by the American Trust and Savings Bank of said The Equitable Trust Company as trustee, under and by virtue of the terms and provisions of said mortgage or deed of trust.

2. Because the appointment of said The Equitable Trust Company as trustee was made, and said The Equitable Trust Company accepted said appointment, before any writ of error was taken by the said Farmers' Loan and Trust Company from the Supreme Court of the United States to this court, and before the said writ of

error was made a supersedeas, and before the citation was lodged in the office of the clerk of this court, and before said citation was served upon this appellee.

3. Because said supplemental decree was entered on due notice to all the parties interested and the Farmers' Loan and Trust Company, the American Trust and Savings Bank and The Northern Trust Company were present in court by their solicitors at that time.

4. Because the said decree of June 4, 1896, which was affirmed by this court was fully executed and all the conditions and provisions thereof fully performed before the writ of error from the Supreme Court of the United States to this court was taken by the said Farmers' Loan and Trust Company, and before a supersedeas was issued by said Supreme Court, and before citation was lodged in the office of the clerk of this court or service on the defendant in error.

5. Because the foreclosure suit brought by the Farmers' Loan and Trust Company to foreclose the trust deed mentioned in said decree of June 4, 1896, has been entirely disposed of with the exception of determining the amount of compensation to be paid to the Farmers' Loan and Trust Company for its fees as trustee under said mortgage.

KNIGHT & BROWN,
WILLIAM G. ADAMS,
Attorneys for The Lake Street Elevated Railroad Company, Appellee.

PETITION FOR WRIT OF ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

The Lake Street Elevated Railroad Company, *Plaintiff in Error,* *vs.* The Farmers' Loan and Trust Company, The American Trust and Savings Bank and The Northern Trust Company, *Defendants in Error.*	Writ of Error to the Supreme Court of Illinois.

To the Honorable the Justices of the Supreme Court of the United States:

And now comes the Lake Street Elevated Railroad Company, by Clarence A. Knight, its attorney, and shows to the court that in the record and proceedings in a suit lately pending in the Supreme Court of Illinois, between the Farmers' Loan and Trust Company, appellant, and the Lake Street Elevated Railroad Company, the American Trust and Savings Bank and the Northern Trust Company, appellees, and in which said cause a final judgment or order was entered on the 17th day of April, A. D. 1901, remanding said cause to the Superior Court of Cook County, Illinois, with directions to dismiss the bill of complaint, a record of which suit is now here presented, it appears that on the 26th day of March, A. D. 1900, the Supreme Court of the United States did order and adjudge that the judgment entered in said cause by the Supreme Court of Illinois on the 18th day of June, A. D. 1898, be and the same was thereby reversed with costs, and it was further ordered that the said cause be and the same

was thereby remanded to the said Supreme Court of Illinois, for further proceedings not inconsistent with the opinion of the Supreme Court of the United States. And the said Supreme Court of Illinois, on said 17th day of April, A. D. 1901, erroneously took further proceedings in said cause inconsistent with the opinion of the Supreme Court of the United States, as is more particularly set out in the assignment of errors herewith presented and hereto attached, from all of which it appears in the record and proceeding in said suit manifest error has happened, to the great damage of said the Lake Street Elevated Railroad Company.

Therefore, said the Lake Street Elevated Railroad Company prays for the allowance of a writ of error to said Supreme Court of the State of Illinois, and that upon the filing of a bond as required by law in the sum to be fixed by the court, that said writ of error may operate as a supersedeas, and for such other process as may cause said suit to be removed into the Supreme Court of the United States and any error contained in the record thereof to be there corrected.

CLARENCE A. KNIGHT,
Attorney for said Plaintiff in Error,
The Lake Street Elevated Railroad Company.

The writ of error above prayed for is hereby allowed to operate as a supersedeas upon the plaintiff in error filing a bond as required by law in the penal sum of five thousand dollars.

April 23, 1901.

H. B. BROWN,
Associate Justice Sup. Court U. S.

IN THE SUPREME COURT OF THE UNITED STATES.

The Lake Street Elevated Railroad Company, *Plaintiff in Error,* *vs.* The Farmers' Loan and Trust Company, The American Trust and Savings Bank, and The Northern Trust Company, *Defendants in Error.*	Writ of Error to the Supreme Court of Illinois.

ASSIGNMENT OF ERRORS.

Now comes the plaintiff in error, the Lake Street Elevated Railroad Company, by Clarence A. Knight, its attorney, and says that in the record and proceedings in the above entitled cause, there is manifest error in this, to wit:

I.

That said Supreme Court of Illinois erred in rendering its said judgment and order herein reversing its former judgment entered herein and remanding said cause to the Superior Court of Cook County, Illinois, in this, to-wit: That it appears in and by the record and proceedings aforesaid that the judgment of the Supreme Court of Illinois was reversed by the Supreme of the United States, and it was further ordered that the said cause be remanded to the said Supreme Court of Illinois for proceedings not inconsistent with the opinion of the Supreme Court of the United States, and in and by its said judgment and order said Supreme Conrt of Illinois erroneously ordered that the said judgment be reversed and the said cause remanded to the Superior Court of Cook County, Illinois, with directions to that court to dismiss the bill of complaint.

II.

That said Supreme Court of Illinois erred in rendering its said judgment and order herein reversing its former judgment entered herein and remanding said cause to the Superior Court of Cook County, Illinois, in this, to wit: That it appears in and by the record and proceedings aforesaid that the judgment of the Supreme Court of Illinois in the above entitled cause was reversed by the Supreme Court of the United States, and it was ordered that the cause be remanded to that court for proceedings not inconsistent with the opinion of the Supreme Court of the United States, and it appears in the record and proceedings of the above entitled cause in which said judgment of the Supreme Court of Illinois so reversed was entered, that the decree which was by the said judgment of the Supreme Court of Illinois affirmed, provided as follows:

"It is therefore ordered, adjudged and decreed by the court that the said defendant, the Farmers' Loan and Trust Company, be and it is hereby removed as trustee or co-trustee under said mortgage or deed of trust, made, executed and delivered by said complainant, the Lake Street Elevated Railroad Company, to the said defendant, the American Trust and Savings Bank, as trustee, and the said defendant, the Farmers' Loan and Trust Company, as co-trustee, which said mortgage or deed of trust is dated the 7th day of April, 1893, and was duly filed for record in the office of the recorder of deeds of the County of Cook, in the State of Illinois, on the 6th day of May, 1893, and there recorded in book 4,256 of records, at page 230, and which was afterwards and on the 11th day of May, 1893, duly filed in the office of the secretary of state of the State of Illinois, and there recorded in book 12, at page 266.

And it is further ordered, adjudged and decreed by the court that the said defendant, the Farmers' Loan and

Trust Company, and its attorneys, solicitors, officers, agents and servants, and each and every of them, be and they are hereby perpetually enjoined and restrained from taking any proceedings or bringing or prosecuting any suit or suits to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings Bank and said Farmers' Loan and Trust Company, or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust so made, executed and delivered by the said complainant, the Lake Street Elevated Railroad Company, to the said defendant, the American Trust and Savings Bank, as trustee, and the said defendant, the Farmers' Loan and Trust Company, as co-trustee.

And it is further ordered, adjudged and decreed that the said defendant, the American Trust and Savings Bank, as trustee under the said mortgage or deed of trust so made, executed and delivered by the said complainant, the Lake Street Elevated Railroad Company, to the said defendant, the American Trust and Savings Bank, as trustee, and the said defendant, the Farmers' Loan and Trust Company, as co-trustee, do, and it is hereby ordered and directed to appoint, by an instrument in writing, within thirty days from the date of the entry hereof, a co-trustee, under the said mortgage or deed of trust, so made, executed and delivered by the said complainant, as aforesaid, in place of the said defendant, the Farmers' Loan and Trust Company, and that upon such successor being so appointed by the said defendant, the American Trust and Savings Bank, as aforesaid, such successor shall, upon accepting said appointment as aforesaid, under said mortgage or deed of trust, be and become vested with all the property rights, duties and trusts of a trustee under said trust deed, with the like effect as if named as trustee therein, and shall likewise be vested with all right, title and interest of said Farmers' Loan and Trust Company under said trust deed, and that the said the Farmers' Loan and Trust Company, on the written request of the said new trustee so appointed, shall immediately execute an instrument of transfer to vest in such new trustee upon the trusts in said trust deed expressed, all the property, privileges and

rights thereunder of the said the Farmers' Loan and Trust Company, and that said the Farmers' Loan and Trust Company shall duly assign, transfer and deliver to such new trustee so appointed any moneys held under and by virtue of such trust deed, for the further security of the bondholders, and that in case of the failure upon the part of said the Farmers' Loan and Trust Company to make, execute and deliver the instrument as aforesaid, that A. F. Stevenson, master in chancery of this court, is authorized and directed to make, execute and deliver on behalf of said the Farmers' Loan and Trust Company the instrument required by it to be made and delivered as aforesaid, and that such instrument or instruments when so made, executed and delivered by such master in chancery as aforesaid, shall have the same force and effect as though made, executed and delivered by the said defendant, the Farmers' Loan and Trust Company.

It is further ordered, adjudged and decreed that upon the failure of the said The American Trust and Savings Bank to make the appointment as aforesaid, within thirty days, that the court hereby reserves the power, right and authority to appoint a co-trustee as successor to said The Farmers' Loan and Trust Company under said trust deed, and for the purposes afore-said and for all other purposes deemed by this court necessary and proper to enforce this decree and all the provisions thereof, this court expressly reserves unto itself jurisdiction of the cause, and jurisdiction of all parties thereto and hereto."

And that the Supreme Court of the United States did not reverse said decree except in so far as it enjoined and restrained the Farmers' Loan and Trust Company and its attorneys, solicitors, officers, agents and servants, and each and every of them, from prosecuting a certain suit to foreclose said mortgage or trust deed from said the Lake Street Elevated Railroad Company to said the American Trust and Savings Bank and said the Farmers' Loan and Trust Company, then pending in the Circuit Court of the United States, in and for the Northern District, Northern Division, of the State of Illinois, and

that in and by its said judgment or order remanding said cause to the Superior Court of Cook County, Illinois, under the mandate of the Supreme Court of the United States, the said Supreme Court of Illinois erroneously remanded said cause to the Superior Court of Cook County, Illinois, with directions to dismiss the bill of complaint.

III.

That said Supreme Court of Illinois erred in not holding that the Supreme Court of the United States reversed the said judgment of the Supreme Court of Illinois affirming the decree of the Superior Court of Cook County, Illinois, only insofar as the said decree enjoined the Farmers' Loan and Trust Company, its attorneys, solicitors, officers, agents and servants, and each of them, from prosecuting a certain suit to foreclose said mortgage or trust deed from said the Lake Street Elevated Railroad Company to said the American Trust and Savings Bank and said the Farmers' Loan and Trust Company, then pending in the Circuit Court of the United States in and for the Northern District and Northern Division of the State of Illinois, and in not holding that the said judgment of the Supreme Court of Illinois, affirming the decree of the Superior Court of Cook County, Illinois, was affirmed by the Supreme Court of the United States, in all other respects.

IV.

That said Supreme Court of Illinois erred in not remanding said cause to the Superior Court of Cook County, Illinois, with directions to set aside only that part of said

decree enjoining and restraining the Farmers' Loan and Trust Company, and its attorneys, solicitors, officers, agents and servants, and each and every of them, from taking any further proceedings or prosecuting a suit or suits to foreclose said mortgage or trust deed from said the Lake Street Elevated Railroad Company to said the American Trust and Savings Bank and said the Farmers' Loan and Trust Company, then pending in the Circuit Court of the United States in and for the Northern District and Northern Division of the State of Illinois.

V.

That said Supreme Court of Illinois, in issuing its said mandate on April 17, 1901, in the following words, to wit: Therefore, in obedience to said mandate and in compliance therewith, it is considered by the court that the judgment of the Appellate Court and the decree of the Superior Court in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to dismiss the bill," refused and did not follow the opinion of the Supreme Court of the United States rendered in the above entitled cause.

VI.

That the Supreme Court of Illinois erred in rendering its said judgment and order herein in the following words, to wit: "Therefore in obedience to said mandate and in compliance therewith, it is considered by the court that the judgment of the Appellate Court and decree of the Superior Court in this behalf rendered, be reversed,

annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to dismiss the bill."

VII.

That the Supreme Court of Illinois, in rendering its said judgment and in issuing its said order or mandate to the Superior Court of Cook County, Illinois, on said April 17, 1901, did not conform to, and its said mandate and order is inconsistent with, the said opinion of the Supreme Court of the United States in said cause.

VIII.

That the Supreme Court of Illinois was in duty bound to issue to the said Appellate Court of Illinois and the said Superior Court of Cook County, Illinois, its mandate directing that so much of said decree of the Superior Court of Cook County, Illinois, entered on the 4th day of June, 1896, as enjoined the further prosecution of said suit to foreclose said mortgage or trust deed from said the Lake Street Elevated Railroad Company to said the American Trust and Savings Bank, and said the Farmers' Loan and Trust Company, pending in the Circuit Court of the United States in and for the Northern District and Northern Division of the State of Illinois, should be stricken therefrom and set aside, and that in all other respects said decree should remain in full force and effect.

IX.

The Supreme Court of Illinois erred in rendering its said judgment and order in this, to wit: That it appears in and by the record and proceedings aforesaid that the judgment of the Supreme Court of Illinois entered in the above entitled cause was reversed by the Supreme Court of the United States, and it was further ordered by the said Supreme Court of the United States that the said cause be remanded to said Supreme Court of Illinois for proceedings not inconsistent with the opinion of the Supreme Court of the United States rendered in the above entitled cause, and that it also appears in and by the record and proceedings aforesaid that after the judgment of the Supreme Court of Illinois was rendered, and before the writ of error was prosecuted by the Farmers' Loan and Trust Company in said cause, and allowed by the Supreme Court of the United States to said Supreme Court of Illinois, the mandate of the said Supreme Court of Illinois was duly filed, in accordance with the statutes of the State of Illinois in such case made and provided, and the said Superior Court of Cook County, Illinois, entered a supplemental decree, ordering, adjudging and decreeing that the Equitable Trust Company be, and it was thereby vested with all the property, rights, duties and trusts of a trustee under said trust deed, with like effect as if named as trustee therein, and said the Equitable Trust Company was thereby vested with all right, title and interest of said the Farmers' Loan and Trust Company under said trust deed, and in and by its said judgment and order the said Supreme Court of Illinois erroneously ordered that the said cause be remanded to

the Superior Court of Cook County, Illinois, with directions to dismiss the bill of complaint.

Wherefore, the said plaintiff in error, the Lake Street Elevated Railroad Company, prays that the judgment and order of the said Supreme Court of Illinois, reversing the judgment of the Appellate Court of Illinois and the decree of the Superior Court of Cook County, Illinois, and remanding said cause to the Superior Court of Cook County, Illinois, with directions to dismiss the bill of complaint, be reversed.

CLARENCE A. KNIGHT,
Attorney for said Plaintiff in Error.

No. 669.

Br. of Turner & Burry

Filed May 13, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,* vs. THE FARMERS' LOAN AND TRUST COMPANY et al., *Defendants in Error.*	Writ of Error to Supreme Court of Illinois.

Motion to Vacate Supersedeas and Suggestions in Support Thereof.

HERBERT B. TURNER,
WILLIAM BURRY,
Solicitors for The Farmers' Loan and Trust Company, Defendant in Error.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,* *vs.* THE FARMERS' LOAN AND TRUST COMPANY et al., *Defendants in Error.*	Writ of Error to Supreme Court of Illinois.

MOTION TO VACATE SUPERSEDEAS AND TO DISMISS OR AFFIRM.

Now comes the Farmers' Loan and Trust Company, defendant in error, and moves the court to vacate the *supersedeas* granted in the above entitled cause.

And said defendant in error also moves the court to dismiss the writ of error granted in this cause.

And said defendant in error also moves the court, in case the motion to dismiss said writ of error be not granted, that the judgment of the Supreme Court of Illinois be affirmed, on the ground that the said writ of error was taken for delay only, and that the question brought up by the writ of error is so frivolous as not to need further argument.

This cause was formerly before this court, and on March 26, 1900, an opinion was handed down, which is reported in 177 U. S., 51. The order of this court was, "Accordingly, the judgment of the Supreme Court of Illinois is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion."

The Supreme Court of Illinois had affirmed a decree entered by the Superior Court of Cook County. The order of this court therefore involved the reversal of that decree of the Superior Court. In its opinion this court plainly indicated that after the Superior Court's decree was reversed the bill should be dismissed.

The mandate of this court and a copy of its opinion were filed in the Supreme Court of Illinois on March 2, 1901, and the Farmers' Loan and Trust Company moved that the decree of the Superior Court be reversed and the cause remanded to that court, with instructions to dismiss the bill. The Lake Street Elevated Railroad Company insisted that, for certain reasons, the mandate of this court could not be obeyed and that the Illinois Supreme Court had no power to order a reversal of the decree of the Superior Court or to order that the bill be dismissed, and it filed a counter motion substantially that the Illinois Supreme Court should hold the mandate of this court to be unavailing, should not reverse the decree of the Superior Court and should allow the decree—including the injunction part—to stand. The long assignment of errors is all directed to this one point.

The Supreme Court of Illinois granted the motion made by the Farmers' Company, reversed the decree of the Superior Court and remanded the case to the Superior Court with directions to dismiss the bill.

In so doing the Illinois Supreme Court followed exactly the letter and spirit of the mandate and opinion of this court.

Thereupon the Lake Street Elevated Railroad Company sued out the present writ of error and has obtained an order for a *supersedeas* thereon.

We submit that it very plainly appears that this writ of error is taken out for purposes of delay only, and that any points made in support of it are frivolous; that a writ of error to a state Supreme Court and its accompanying *supersedeas* are discretionary.

We submit especially that the *supersedeas* granted in this cause, with its tendency to embarrass other litigation shown in the opinion of this court, should be vacated.

We attach to this motion suggestions in support of the motions now made, and we have also printed and file herewith copies of the mandate of this court, of the order and mandate of the Supreme Court of Illinois entered in pursuance thereof, of a motion made by the Lake Street Company in the Illinois Supreme Court for leave to file a supplemental transcript, and of the petition for this writ of error and the assignments of error, as the same appear in the transcript, which, it is believed, is all that is necessary to be considered by the court.

The motions herein made are therefore respectfully submitted to the court.

HERBERT B. TURNER,
WILLIAM BURRY,
Solicitors for the Farmers' Loan and Trust Company.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,* vs. THE FARMERS' LOAN AND TRUST COMPANY et al. *Defendants in Error.*	Writ of Error to Supreme Court of Illinois.

SUGGESTIONS IN SUPPORT OF MOTIONS TO VACATE SUPERSEDEAS AND TO DISMISS OR AFFIRM.

The facts in this case appear fully in the opinion filed [illegible]

Before we prepared these suggestions we had been informed by a letter dated April 25, 1901, (filed) from counsel for the plaintiff in error that "the record is now on its way to Washington, in accordance with the practice in such cases." Since writing these suggestions, and the accompanying printed parts of the record, we have been informed by that counsel that he does not intend to file the record in time for these motions. This has necessitated our filing the record. We have also prepared an index of that record, and prefixed it to the printed parts of the record submitted.

The record on the present writ of error supplements the record on the former writ of error, which was general number 16,939, or No. 108 of the October term, 1899.

IN THE

Supreme Court of the United States

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SUGGESTIONS IN SUPPORT OF MOTIONS TO VACATE SUPERSEDEAS AND TO DISMISS OR AFFIRM.

The facts in this case appear fully in the opinion filed by this court, reported in 177 U. S., 51.

The facts pertinent to the present motion are that in January, 1896, the defendant in error, as mortgage trustee, filed in the Federal court at Chicago a bill to foreclose a mortgage given by the Lake Street Elevated Railroad Company. On the same day, and shortly thereafter, the Lake Street Elevated Railroad Company filed in the Superior Court of Cook County this cause now before the court, and in it sought, among other things, to

remove defendant as trustee, and to enjoin the prosecution of the foreclosure case in the Federal court. The Farmers' Company removed that suit to the Federal court in Chicago, and, on a motion to remand, the Federal court held that it was properly removed.

The Superior Court, however, holding that the case had not been properly removed, proceeded to a hearing and entered a decree granting the prayer of the bill. That decree was appealed to the Appellate Court of Illinois and there affirmed. It was then appealed to the Supreme Court of Illinois and there affirmed. It was then brought to this court by writ of error, and upon that writ of error this court rendered the opinion in 177 U. S., 51, and directed that, "Accordingly the judgment of the Supreme Court of Illinois is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion."

The general effect of the opinion of this court is that the Federal court at Chicago acquired by the foreclosure case prior jurisdiction of the entire subject-matter of the suit in the state court, that the suit in the state court was therefore improper and superfluous, and that every matter contained in the original bill filed in the state court could have been and ought to have been set up by answer to the prior foreclosure bill. The effect of the opinion of this court is that there never was any reason for bringing the Superior Court case and that therefore it ought to be dismissed.

On the opinion and mandate of this court being filed in the Supreme Court of Illinois, that court, following the opinion of this court both in letter and in spirit, reversed the decree of the Superior Court and remanded the case with directions that the bill be dismissed.

The order of the Supreme Court of Illinois entered April 17, 1901, recites in full the mandate of this court and then proceeds as follows:

"Therefore, in obedience to said mandate and in compliance therewith it is considered by the court that the judgment of the Appellate Court and decree of the Superior Court in this behalf rendered be *reversed*, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to dismiss the bill.

And it is further considered by the court that appellant Farmers' Loan and Trust Company recover of and from the said appellees, Lake Street Elevated Railroad Company, the American Trust and Savings Bank and the Northern Trust Company, its costs by it in this behalf expended, and that it have execution therefor."

We submit that this order of the Supreme Court of Illinois is so exactly in conformity with the order and opinion of this court that the present writ of error must plainly be taken for delay and upon frivolous grounds.

The motion for the order entered by the Supreme Court of Illinois was resisted by plaintiff in error on two grounds:

(1) That the only effect of the motion and opinion of this court was to modify the decree of the state court, *by setting aside so much of the decree as enjoined the further prosecution of the foreclosure suit*, and that it was the intention of this court that the remainder of the decree, including that part which removed the trustee, should stand.

(2) That, after the entry of the order of affirmance in the State Supreme Court, and before the supersedeas was granted by this court, the co-trustee appointed a successor to the defendant in error, on the ground that a vacancy was created by the decree removing defendant in error as trustee, that an order was entered approving this

appointment, and that, therefore, the State Supreme Court was without power to give any effect to the mandate of this court.

1. AS TO THE CONTENTION THAT THE MANDATE AND OPINION OF THIS COURT ONLY MODIFIED THE DECREE OF THE STATE COURT, BY STRIKING OUT SO MUCH OF THE DECREE AS ENJOINED THE FURTHER PROSECUTION OF THE FORECLOSURE CASE.

The principal parts of the original decree appealed from are as follows:

"It is therefore ordered, adjudged and decreed by the court that the said defendant, the Farmers' Loan and Trust Company, be and is hereby removed as trustee or co-trustee under the said mortgage or deed of trust," etc.

"And it is further ordered, adjudged and decreed by the court that the said defendant, the Farmers' Loan and Trust Company, and its attorneys, solicitors, officers, agents and servants, and each and every of them, be and they are hereby perpetually enjoined and restrained from taking any proceedings, or bringing or prosecuting any suit or suits to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings Bank and said Farmers' Loan and Trust Company, or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust," etc.

The jurisdiction of the Superior Court to make this decree was challenged at the outset by the fact that there had been a petition and bond filed to remove the case to the Federal court. The petition and motion thereon were denied by the Superior Court.

It will be at once seen that the question of whether the

case was properly removed to the Federal court is jurisdictional and one that must be determined, unless on some other ground the bill is to be dismissed and finally disposed of. For if, for any reason, or for any purpose, or for the entry of any decree, that suit was to be continued, then it would have been absolutely necessary that the question of removal be passed upon by the highest court to which the case went.

The question of removal was fully presented to this court, as appears by the opening paragraph of the opinion, which speaks of questions of removal "which for reasons presently to be stated *we have not found it necessary to decide.*"

Inasmuch as it was absolutely necessary that the question of removal should be decided if the case was to proceed further, this is an express declaration that the case will on other grounds be finally disposed of in that opinion.

The opinion held that the foreclosure suit was prior in time, and that the Federal court had thereby acquired full jurisdiction of the entire matter.

In its opinion this court held that the foreclosure case started in the Federal court was prior in time, and that that court had thereby acquired jurisdiction of the entire matter, to the exclusion of other courts taking cognizance of any matter properly involved in that foreclosure case. This court further held that every question raised or taken in the Superior Court suit could have been, and should have been, properly raised by answer or by cross-bill in the foreclosure suit. If this is so, then the reason for the existence of the Superior Court suit ceased and it should be dismissed. This, we submit, is the

necessary effect of the opinion of this court. Any other view would be inconsistent with the declaration of the court that it was not necessary to decide whether or not the case was properly removed from the Superior Court to the Federal court.

If the Superior Court suit had no *raison d'etre* because the foreclosure suit was pending before the state court suit was begun, and if, for that reason, it should be dismissed, then of course it became unnecessary to pass upon the question of whether that superfluous suit was removed or not.

The action to be taken would be simply to dismiss it.

An examination of the opinion shows that this was plainly what was held. It decides that the foreclosure suit started in the Federal court was first instituted, and that it vested in that court the

"power to hear and determine all controversies relating thereto and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power."

The opinion further states that,

"the principal matters in dispute are the *legal competency* of the Farmers' Loan and Trust Company *to act as trustee* under the mortgage, and whether * * * the Farmers' Loan and Trust Company *can proceed to enforce* the provisions of the mortgage. * * * And these are the matters which *are necessarily involved*, and *can be properly raised*, and determined in the Circuit Court of the United States, whose jurisdiction had attached by the filing of the bill of foreclosure before the commencement of the suit in the state court.

The defendants could not defeat jurisdiction thus acquired, and supplant the case, by bringing suit in another court, and procuring an *ex parte* injunction seeking to restrain the service of process already issued.

We think that this salutary rule is applicable to the present case. The bill filed in the Federal court looked

to the enforcement of the trusts declared in the mortgage, the control of a railroad through a receiver, the sale of the railroad, and the final distribution of the assets of the company. Such a proceeding *necessarily involves the right of the complainant trustee to act as such*, and the determination of the controversy in respect to the ownership of the bonds and to the power of a majority of the bondholders, by an agreement with the stockholders, to dispense with an enforcement of the provisions of the mortgage by judicial proceedings.

These questions are not for our consideration, unless and until they are brought before us on appeal from a final decree of the court *whose jurisdiction was first legally invoked to determine them.*"

This court, therefore, plainly considered the proceedings in the Superior Court a superfluous, useless and improper proceeding, and that that bill ought to be dismissed, leaving the parties to raise all these questions in the foreclosure suit pending in the Federal court.

The express holding of the opinion is (p. 62) "that the Appellate Court of the First District of Illinois erred *in affirming said decree* [of the Superior Court], and that the Supreme Court of Illinois *erred in affirming the judgment of the said Appellate Court.*"

Following this is the direction of the opinion:

"Accordingly, the judgment of the Supreme Court of Illinois is reversed, and the cause is remanded to that court for further proceedings not inconsistent with this opinion."

Its judgment of affirmance is "reversed." Further proceedings must not be inconsistent with the opinion. To permit the Superior Court case to proceed in any way would be inconsistent with the opinion, because the opinion says that for reasons therein given it is not necessary even to determine whether the cause was properly removed or not.

To allow any part of the decree of the Superior Court to stand would be to hold that it rightfully exercised jurisdiction to hear the case and enter a decree. This would be plainly contrary both to the express holdings of this court that the Federal court had acquired prior jurisdiction of the entire subject-matter and that it was unnecessary to pass upon the question of removal.

This court states the two principal matters in dispute in the state court suit to be:

1. "The *legal competency* of the Farmers' Loan and Trust Company to act as trustee under the mortgage," and

2. "Whether, in view of the controvery between the two sets of bondholders," etc., "the Farmers' Loan and Trust Company *can proceed to enforce* the provisions of the mortgage.

These are matters which are *necessarily involved*, and can be properly raised and determined in the Circuit Court of the United States."

These two questions state the entire substance of the state court bill, and in the same paragraph the opinion disposes of them by saying that their proper place is in the foreclosure case.

Clearly, in using the language "the *legal competency* of the Farmers' Loan and Trust Company *to act as trustee*," the court referred to the entire matter involved in the portion of the Superior Court bill that referred to non-compliance with the laws of Illinois and incompetency of the trustee, and prayed the appointment of a new trustee on that account. This question is therefore covered by the opinion of this court, and nothing can remain but that the Superior Court should dismiss the bill.

The Lake Street Company claims that even if the Superior Court had, when it entered the decree, no power

to enjoin the prosecution of the foreclosure suit, yet it had power to remove the trustee. It would be difficult to conceive a more direct way of interfering with the jurisdiction of the Federal court in the foreclosure case than by removing the complainant from its position of trustee. Whether the result is accomplished by injunction or by disabling the complainant matters little. It would be an interference with the prior jurisdiction the Federal court acquired in the foreclosure case.

So completely did this court dispose of the right of the Superior Court to act on all these questions that, although they all were fully raised in the record, it said:

"These questions are not for our consideration, unless and until they are brought before us on appeal from a final decree of the court whose jurisdiction was *first* legally invoked to determine them."

The stress laid by appellees upon the last sentence of the opinion, in which the court says that "the Superior Court erred in its decree perpetually enjoining," etc., is strained.

The context shows that this language was only descriptive of the decree. The language is not that "the Superior Court erred in *that part of its decree* perpetually enjoining," etc., but that "the Superior Court erred in *its* decree."

The decision means, not that the state court had no jurisdiction *to enjoin* the suit in the Federal court, but that the Federal court had acquired prior jurisdiction of the entire subject-matter, and that therefore the Superior Court had no jurisdiction *to act at all.*

The decree directs a conveyance by appellant to another trustee. Can that part of the decree be properly obeyed while the Farmers' Loan and Trust Company is the sole

complainant in the foreclosure case pending in the Federal court? Would not obedience to the Superior Court decree in that particular at once deprive the Farmers' Company of its character as complainant in the Federal court? And would not compelling appellant to make such a conveyance and so obey the decree, interfere seriously with the suit pending in the Federal court?

It is apparent from its opinion that this court considered the institution of the state court suit a hinderance and an impediment to and an interference with the foreclosure suit in which the Federal court had acquired prior jurisdiction. The entire history of the litigation as it appeared in the different opinions of the different courts shows plainly that the object of the Superior Court suit was to prevent or delay the foreclosure case.

From a general glance at the entire controversy, this purpose in instituting and pressing the Superior Court case stands out prominent. This present writ of error is but a continuation of that policy and therefore we submit that our motion to affirm on the ground that the writ of error is taken on frivolous grounds and for delay should be granted.

The opening paragraph of the opinion of this court, in which it is expressly stated that for reasons in the opinion it is not necessary to decide whether the case was removed or not, plainly indicates that this court considered that in that opinion it was fully and finally disposing of the Superior Court case.

That a decree upon such a proceeding, tending to embarrass the prior jurisdiction of another court, should be reversed *and the bill dismissed*, is shown by the cases of *Orton* v. *Smith*, 18 How., 263.

Masson v. *Piggott*, 11 Ill., 85.
Ross v. *Buchanan*, 13 Ill., 58.

In each of these cases the decree was reversed and the bill dismissed, the court in the last case cited saying:

"The rule in cases of concurrent jurisdiction is that the tribunal which first acquires jurisdiction of the subject-matter must proceed to a final disposition of the case.

The decree will be reversed and the bill dismissed."

Other leading cases to the same effect are:

Sharon v. *Terry*, 36 Fed. Rep., 337.
Brooks v. *Delaplaine*, 1 Md. Ch., 354.
Riggs v. *Johnson County*, 6 Wall., 196.
Logan v. *Lucas*, 59 Ill., 238.

2. THE CONTENTION THAT THE STATE SUPREME COURT WAS POWERLESS TO ACT UNDER THE MANDATE OF THIS COURT, BY REASON OF THE ALLEGED APPOINTMENT OF A SUCCESSOR TO THE DEFENDANT IN ERROR BEFORE THE SUPERSEDEAS WAS ISSUED.

When defendant in error moved in the Supreme Court of Illinois that the decree of the Superior Court be reversed and a mandate issue directing the Superior Court to dismiss the bill, a counter-motion was made by the Lake Street Company. That motion was that it have leave to file in the Supreme Court of Illinois a supplemental transcript from the Superior Court of Cook County, showing that subsequent to the appeal from the decree entered therein a new trustee had been appointed to take the place of the Farmers' Company which had been by the state court removed from its position as trustee under the mortgage made by the Lake Street

Company, and that appointment had been made and confirmed in the Superior Court during the ten or fifteen days that elapsed between the affirmance of the decree of the Superior Court by the Supreme Court of Illinois, and the perfecting of a *supersedeas* from this court upon the writ of error taken out to the judgment of the Supreme Court of Illinois.

Counsel for the Lake Street Company, at the time we applied to the Supreme Court of Illinois for a mandate, contended that the decree had been carried out as between the parties, by the appointment of a successor to the Farmers' Company, and that therefore no revision of the decree was possible, and in their printed suggestions to the Supreme Court of Illinois said on this point:

"This court is now powerless to further act under the mandate of the Supreme Court of the United States."

"The mandate of the Supreme Court of the United States cannot affect the rights of the parties under the record of the Superior Court as it now stands."

"Nor can the court stay the effect of the *injunction* part of the decree."

First. It is perhaps enough to say that the motion of the Lake Street Elevated Railroad Company, for leave to file the supplemental record, *was not granted*, and that therefore that record and the matter it contains and the subsequent action taken by the Superior Court of Cook County was not before the Illinois Supreme Court, *is not before this court*, and cannot be considered. The clerk of the Supreme Court of Illinois has certified it as part of the record filed, but has done so improperly, and the date of its filing, the motion for leave to file it and the absence of any order granting that leave show that it is not part of the record.

As, however, that supplemental record may be presented

in answer to our present motion, we suggest that the Illinois Supreme Court may have declined to consider the additional abstract, because the matter contained in it, even if proper for consideration, was wholly void, and the action of the Superior Court in attempting to appoint a successor to the Farmers' Company was wholly void.

The judgment of the Supreme Court of Illinois was entered on June 18, 1898. Before a *supersedeas* from this court was perfected to that judgment, on June 24, 1898, as shown by the supplemental record, upon one day's notice to the opposite side, a copy of the order of affirmance was filed in the Superior Court and the case was called up in that court and the order entered which it is claimed appointed a successor to the Farmers' Company. Section 84 of the Illinois practice act, however, provides that, after a remanding order is filed in the *nisi prius* court, ten days' notice must be served upon the opposite side of a motion to redocket the case and the entry of any order therein. The order upon which the Lake Street Elevated Railroad Company relies was entered, as shown by the supplemental transcript, six days after the order of affirmance by the Illinois Supreme Court and one day after a copy of that order was filed in the *nisi prius* court. The requirement of ten days' notice was not therefore complied with. This ten days' notice has been held by the Illinois courts to be substantially equivalent to service of process for the reinstatement of the case, and is jurisdictional and necessary before the *nisi prius* court can proceed. *Ligare* v. *City of Chicago*, 168 Ill., 151; *Miller* v. *Glass*, 14 Ill. App., 177. And in *People* v. *Wadlow*, 166 Ill., 119, it was held that until the case was properly redocketed in the state court in compliance with the statute, the suit had not returned to that court so that

any proceedings could be had therein. While one day's notice was given to the opposite party of the application for an order appointing a new trustee, and while the party appeared in response to that one day's notice, yet no consent was given and no waiver made of the right to the ten days notice.

Second. In support of their position two or three cases were cited by counsel for the Lake Street Company, where this court declined *upon motion made pending a writ of error* to undo what the state court had done before the *supersedeas* was granted. This, however, is an entirely different matter from proceedings taken after final judgment of this court.

The broad statement that this court can never undo or set aside anything done under an erroneous judgment of a state court if such act is done between the entry of the judgment of the State Supreme Court and the perfecting of a *supersedeas* from this court, is enough to show upon its face its erroneous character.

The judgment of this court is that the decree which removed the Farmers' Loan and Trust Company as trustee must be reversed. If that decree is reversed, then the Farmers' Loan and Trust Company is reinstated as trustee and there is no room for its successor.

There is of course here no question of the rights of a *bona fide* purchaser for value. Even if we regard the supplemental record as being in the case, it simply shows the appointment of a new trustee, but does not show that that new trustee stands in the position of a *bona fide* purchaser for value.

It is a rule of law too well settled to call for discussion, that the reversal of a decree takes away all rights given

to the parties by the decree and restores them to their original position. As between the parties to the suit, upon the reversal of a decree the party successful in the court below must restore to his opponent that which the decree took away from him.

We have here no innocent purchaser for value. The supplemental record ought not to be considered upon this application. But, even if considered, the most that it shows is a document wherein the American Trust and Savings Bank as trustee attempted to appoint the Equitable Company as successor to the Farmers' Company, under the trust deed.

When the main decree is reversed as having been wrongly entered, because the United States court had acquired prior jurisdiction of the entire subject-matter, the attempted appointment necessarily falls with the decree, for the reason that the decree removing the Farmers' Loan and Trust Company having been set aside, there was in fact no vacancy.

No sale, judicial or otherwise, for a valuable consideration is shown or attempted to be shown. Nothing is shown to have been done by the Equitable Trust Company, nor, by the terms of the document, is it required to pay any consideration or to be a *bona fide* purchaser for value.

If the successful party to an erroneous decree gains title to the property by that decree, it is undisputed that upon a reversal of the decree he must restore title to his opponent. So, if, while he held the title under the erroneous decree, he transferred it to a third party for love and affection only, and not for a valuable consideration, upon a reversal of the erroneous decree it is equally clear

that both he and his grantee must restore the title to the original holder. The present case is exactly the same. The record shows no consideration paid by the Equitable Company, and nothing done by it in pursuance of its appointment. Therefore the appointment of the Equitable Company must fall with the reversal of the decree.

The only title *a party to the suit* acquires, or can acquire under a decree, even in the case of a judicial sale, is a *voidable* title, subject to be defeated by a reversal of the decree.

Galpin v. *Page*, 18 Wall., 350, 374.
Smith v. *Brittenham*, 109 Ill., 541.

So, also, the assignee of a judgment or decree only succeeds to the right of the party in whose favor the judgment was entered, and any title which he acquires under such judgment is subject to be defeated by a subsequent reversal.

McIlton v. *Love*, 13 Ill., 486.
Roberts v. *McClelland*, 82 Ill., 538.
Smith v. *Huntoon*, 134 Ill., 24.

The defense of a *bona fide* purchaser for value is an affirmative defense, and it is incumbent on parties setting it up to aver and prove that the defendant *actually paid the purchase price* in money—an obligation to pay is not sufficient—and that *this payment was made before notice*, and in reliance upon the apparently absolute title.

Boone v. *Chiles*, 10 Peters, 177.
Wormley v. *Wormley*, 8 Wheat., 421–449.
Smith v. *Orton*, 18 U. S. Sup. Ct. Reports (L. C. P. Co. Ed.), 62.

Keyes v. *Test*, 33 Ill., 317.
Roseman v. *Miller*, 84 Ill., 299.

In *Boone* v. *Chiles* the court said:

"*A new case is presented not responsive to the bill.* * * * *It must be established affirmatively by the defendant* independently of his oath. In setting it up by plea or answer it must state the deed of purchase, the date, parties and contents briefly, that the vendor was seized and in possession. The consideration must be stated *with a distinct averment that it was bona fide and truly paid independently of the recital in the deed.* Notice must be denied previous to *and down to the time of paying the money and the delivery of the deed.*"

In considering this question of *bona fide* purchaser for value, the supersedeas is immaterial. A supersedeas is simply for the purpose of staying the action of the court's officers. An appeal or writ of error is none the less *lis pendens* because there is no supersedeas.

Carr v. *Kates*, 9 S. W. Rep., 659.
Galpin v. *Page*, 18 Wall., 350.

A certain line of decisions give protection to a purchaser at a judicial sale. Such sale is, however, entirely distinct and different from a sale made by the successful party to an erroneous decree. The purchaser at a judicial sale is protected because of public policy in encouraging bidders at such sales. In such a case the purchaser deals with the court's officers. The sale is the court's and to encourage bidders and to protect the best prices in the interest both of the judgment creditor and the judgment debtor, the law has established the rule, as a rule of policy, that a third person purchasing at such judicial sale shall acquire an absolute title. This rule, however, does not apply to the successful party in an erroneous decree. Where the sale is not strictly what is known as

a judicial sale, where the purchase is made by the successful party to the decree, the purchaser takes with all the chances of reversal.

Clary v. *Marshall*, 4 Dana, 96.
Smith v. *Brittenham*, 109 Ill., 540.
Madeira's Heirs v. *Hopkins*, 12 B. Mon., 595.
Marks v. *Cowles*, 61 Ala., 209, 307.
Reynolds v. *Harris*, 14 Cal., 668.

IN ANY VIEW, THE ORDER OF THE SUPREME COURT OF ILLINOIS WAS NOT INCONSISTENT WITH THE OPINION OF THIS COURT, AND WAS, THEREFORE, IN CONFORMITY WITH THE MANDATE.

Plainly, however, the Supreme Court of Illinois acted in this cause within the mandate and direction of this court. This court found that the Federal court in Chicago had, in the foreclosure proceedings, acquired prior jurisdiction of the entire subject-matter. It reversed the judgment of the Supreme Court of Illinois and directed that future proceedings should not be inconsistent with its opinion. When that mandate came before the Illinois Supreme Court it reversed the decree it had before affirmed. That certainly was in exact conformity with the mandate of this court. That decree being reversed, the direction was that further proceedings should be in conformity with the opinion of this court. This court had said that the Federal court had acquired prior jurisdiction. Any remanding order of the Illinois Supreme Court would be proper that was not inconsistent with that holding of the opinion. The Illinois Supreme Court was therefore at liberty, in remand-

ing the cause to the Superior Court, to give it such directions as it thought best, provided they were not inconsistent with the opinion of this court. The Supreme Court directed the Superior Court to dismiss the bill. In what particular was that order inconsistent with the opinion of this court? If the Federal court had prior jurisdiction of the subject-matter, the Supreme Court of Illinois could apply the rule of comity as between courts of concurrent jurisdiction in any way that it chose, so long as it was not inconsistent with the opinion of this court. The Supreme Court of Illinois evidently considered that the best way to preserve and maintain comity between the two *nisi prius* courts of concurrent jurisdiction was by completely discontinuing the case in the state *nisi prius* court. Was this inconsistent with the opinion of this court? The opinion of this court did not direct the Supreme Court of Illinois to remand the case with directions to dismiss or to stay the cause, but left it entirely within the discretion of the Supreme Court of Illinois so long as such discretion was not inconsistent with this court's opinion. Inasmuch as the action taken was not inconsistent with the opinion of this court, this court cannot review that action, even although that action went farther or was more radical than this court contemplated. The direction to dismiss the bill was not inconsistent with this court's opinion and therefore must stand.

All these matters show this present writ of error to have been so plainly taken for delay that we feel justified in presenting these motions.

THE WRIT OF ERROR AND SUPERSEDEAS ARE IN THIS CASE DISCRETIONARY.

"A writ of error to the highest court of a state is not allowed as a right, and ought not to be sent out when the court in session, after hearing, is of opinion that it is apparent upon the face of the record that the issue of the writ would only result in the affirmance of the judgment.."

In re Kemmler, 136 U. S., 436.
Spies v. *Illinois*, 123 U. S., 131.
Twitchell v. *Commonwealth*, 7 Wall., 321.

In the last case the court said:

"The writs of error to state courts have never been allowed as of right."

The writ of error in this case being, therefore, not a matter of right, but discretionary, and the *supersedeas* thereon being likewise discretionary, the motion to vacate the *supersedeas*, thereby allowing the Superior Court of Cook County to dismiss the bill, is addressed to the discretion of the court.

Under all the circumstances and considering all the unnecessary delay that has heretofore occurred in this litigation, we respectfully submit that this motion ought to be granted and the *supersedeas* vacated.

The writ of error in this case was allowed on April 23, 1901, returnable in thirty days, and this motion is submitted before the return day of the writ. But this practice is expressly authorized in *Clark* v. *Hancock*, 94 U. S., 493, where the change from the old practice is noticed, and it is said that the court will entertain a motion to dismiss before the return day of the writ, as "likely to prevent delays and expense and further the ends of justice."

AS THE ORDER OF JUDGMENT OF THE STATE SUPREME COURT WAS IN ACCORDANCE WITH THE MANDATE OF THIS COURT, THE WRIT OF ERROR SHOULD BE DISMISSED.

Where a writ of error has been taken from a judgment of an inferior court entered in exact accordance with the mandate of this court, and that fact is shown to this court, it will act at once, *on motion*, and the writ of error will be dismissed with costs.

Where the proceedings upon the mandate follow the mandate a second writ of error cannot be maintained.

Texas & P. R. Co. v. *Anderson*, 149 U. S., 237.

In May's U. S. Sup. Ct. Prac. it is said on p. 380:

"An appeal or writ of error will not be entertained from a decree or judgment of an inferior court entered in exact accordance with the mandate of the Supreme Court issued upon a previous appeal or writ of error, inasmuch as such a decree or judgment, when entered below, is, in effect, the decree or judgment of the Supreme Court, and its review would be practically a review of its own decision. If such an appeal shall be taken or such writ of error brought, the Supreme Court will, however, examine the decree or judgment, entered by the court below; and if it finds that it conforms to the mandate, the appeal or writ of error will be dismissed with costs. (*Mason* v. *Pewabic Mining Co.*, 153 U. S., 361, 366; *Texas and Pacific Railway* v. *Anderson*, 149 U. S., 237, 242; *Kingsbury* v. *Buckner*, 134 U. S., 650, 671; *Humphrey* v. *Baker*, 103 U. S., 736, 737; *Stewart* v. *Salamon*, 97 U. S., 361; *Tyler* v. *Maguire*, 17 Wallace, 253; *Cook* v. *Bromley*, 11 Wallace, 672, 677; *Washington Bridge Co.* v. *Stewart*, 3 Howard, 413, 424)."

Upon a motion to dismiss this court will examine to

see if the proceedings in the inferior court conform to its mandate, and if it finds that they did conform to its mandate, the writ of error will be, *on motion*, dismissed.

Cook v. *Bromley*, 11 Wall., 672.
Stewart v. *Salamon*, 97 U. S., 361.
Humphrey v. *Baker*, 103 U. S., 736.

In *Whitney* v. *Cook*, 99 U. S., 607, the court said:

"Parties should not be subject to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

In *Chanute City* v. *Trader*, 132 U. S., 210, the court said:

"In the present case there does not appear to be any ground for contending that this court has no jurisdiction; yet we are entirely satisfied that the reasons assigned for taking the writ of error are frivolous and that it was taken for delay only." And the court affirmed the judgment.

HERBERT B. TURNER,

WILLIAM BURRY,

Solicitors for the Farmers' Loan and Trust Company.

Office Supreme Court U. S.
FILED
MAY 25 1901
JAMES H. McKENNEY,
Clerk

Nos. 669 & 687.
Add'l Brf. of Turner & Durrey for

Supreme Court of the United States. O. T.

OCTOBER TERM, A. D., 1900.

Filed May 25, 1901.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,*	
vs.	No. 669 and No. 687.
THE FARMERS' LOAN AND TRUST COMPANY et al., *Defendants in Error.*	

ADDITIONAL SUGGESTIONS ON MOTIONS.

As stated in the suggestions formerly filed by us in this case, the plaintiff in error did not file the transcript of the record in this court in time for us to make the motions to vacate the *supersedeas*, dismiss the writ of error, etc., now pending in this court. We, therefore, had a duplicate record prepared and filed in the cause in this court in which the *supersedeas* was granted on May 13, 1901.

In doing so we supposed we were simply filing the record which he had said by letter on April 29th, was then on its way to this court. That letter is now filed in this court in No. 669.

We have just been informed by letter from the clerk of this court that the attorney for plaintiff in error has now, on the return day of the writ, filed and docketed a transcript of record made by the Illinois Supreme Court clerk in obedience to the writ of error issued herein; and he seems to have succeeded in having it filed and docketed as No. 687 of this term.

This makes two cases pending in this court at the same time on the same writ of error.

This is evidently done in order to embarrass the defendant in error in case its motions prevail. The motions were made and submitted in No. 669, both sides filing suggestions. If the court allows the motions a mandate will issue in that case. It is, evidently, however, the intention of plaintiff in error to then insist that the *supersedeas* remains undisposed of in the case he has lately docketed, No. 687.

We think No. 687 was improperly docketed by the clerk and that there cannot be two cases pending in this court on the same writ of error.

We therefore respectfully request that No. 687 be dismissed or else consolidated with No. 669. If, however, they must both remain, as the clerk has so docketed them, we then request that if any order is entered in No. 669 the same order be entered in No. 687. Otherwise the docketing of the two transcripts on one writ of error may possibly result in an order entered in the first case being neutralized by the filing of the other transcript.

HERBERT B. TURNER,

WILLIAM BURRY,

Solicitors for The Farmers' Loan and Trust Co.

Filed May 21, 1904.

Supreme Court of the United States.

October Term, A. D. 1904.

THE [illegible] ELEVATOR RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE FARMERS LOAN AND TRUST COMPANY, ET AL.,
Defendants in Error.

Reply to Suggestions of Plaintiff in Error Against Motions to Docket Supplemental, &c.

HERBERT A. TURNER,
WILLIAM BURRY,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,* vs. THE FARMERS' LOAN AND TRUST COMPANY et al., *Defendants in Error.*	Writ of Error to Supreme Court of Illinois.

Reply to Suggestions of Plaintiff in Error Against Motions to Vacate Supersedeas, &c.

In the suggestions filed against our motions the principal error arises from the misconception, plainly always in counsel's mind, that this entire case is to be reargued and reconsidered by the court on the present writ of error. This idea crops out all the time. He does not recognize that the opinion of this court is decisive of the law, or that the statement of the case which precedes the opinion states the facts found.

The other error into which he falls is the idea that the supplemental record from the Superior Court, which the

Illinois Supreme Court *did not give him leave to file*, and which seems to relate to matters occurring long after the record was made up in this case, became part of the record in the Illinois Supreme Court, or can be considered as part of the record in this court. The mere fact that the clerk of the Illinois Supreme Court filed it, or insisted upon inserting it as part of the certified record, does not make it part of the record or bring it before this court.

Eliminate from the suggestions filed by counsel for plaintiff in error the parts depending upon the above two misconceptions, and there is very little left of them.

He further insists that in its opinion this court affirmed part of the decree of the Superior Court. Nothing could be further from the letter and spirit of that opinion.

Upon this second writ of error, plaintiff in error cannot have a rehearing of what was passed upon in the former opinion. His suggestion, therefore, on page 2, that the original bill and all the proceedings and the original decree must be printed is wrong. Even if it were right, however, they are all printed in the printed record of the original case, which was No. 108 of the October, 1899, term, and can be referred to there.

If less than three weeks' notice of the motions was given, still the rule does not require that much notice on a motion to vacate the supersedeas, a brief could not be prepared and three weeks' notice given in time to submit a motion at this term, and counsel for plaintiff in error has accepted the two weeks from the time notice was served in which to prepare and file his suggestions.

On pages 14, 15, 30 and elsewhere in his suggestions counsel for plaintiff in error makes many statements con-

cerning the progress of the foreclosure case which are wholly outside of the proper record. It nowhere appears that all the bondholders have been settled with, or that plaintiff in error has bought up their bonds or redeemed them at par, or that it has deposited the bonds under the scaling arrangement. No such facts, even if they existed, were in the record before the Illinois Supreme Court, and therefore cannot be considered here. Indeed, the extracts from remarks of Judge Grosscup, appearing on pages 27 and 28 of suggestions for plaintiff in error, show that as late as May 28, 1900, the Federal Circuit Court held that the foreclosure case was in a condition and position to be further prosecuted.

By the heading VI and the first paragraph thereunder counsel for plaintiff in error in effect states that he wishes to reargue on this writ of error the merits of the case, and he then proceeds to restate his version of the original case. If this was his purpose in obtaining this writ of error, it is plainly taken for delay only and on frivolous grounds.

The position taken on page 22 of the suggestions, that this court passed upon and by implication affirmed the state court's holding that the case was not properly removed to the Federal court, is too far-fetched to call for argument against it.

The authorities on pages 34 and 35 of the suggestions, are upon motions made before this court had decided the cases upon their merits.

This court ordered that the judgment of the Illinois Supreme Court, affirming the decree of the Superior Court, be reversed. The Illinois Supreme Court then reversed the decree of the Superior Court. It therein

obeyed exactly the order of this court. The Illinois Supreme Court then, for reasons satisfactory to itself and undoubtedly in accordance with the law of the state and with comity between courts, as the same is recognized in Illinois, ordered that the bill be dismissed. That order was not inconsistent, was the opinion of this court and must therefore stand.

HERBERT B. TURNER,
WILLIAM BURRY,
Solicitors for the Farmers' Loan and Trust Company.

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No. 669.

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JAMES H. McKENNEY,
Cl

Brf. of Knight for P. C. (on m

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Filed May 18, 1901.

IN THE

Supreme Court of the United States.

The Lake Street Elevated Railroad Company, *Plaintiff in Error,* vs. The Farmers' Loan and Trust Company, The American Trust and Savings Bank and The Northern Trust Company, *Defendants in Error.*	In Error to the Supreme Court of Illinois.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR TO AFFIRM.

CLARENCE A. KNIGHT,
ATTORNEY FOR PLAINTIFF IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

The Lake Street Elevated Railroad Company, *Plaintiff in Error,* *vs.* **The Farmers' Loan and Trust Company, The American Trust and Savings Bank and The Northern Trust Company,** *Defendants in Error.*	In Error to the Supreme Court of Illinois.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR TO AFFIRM.

The defendant in error, the Farmers' Loan and Trust Company, has presented to the court a motion—

1. To vacate the supersedeas granted in this cause.

2. To dismiss the writ of error granted in this cause.

3. To affirm the judgment of the Supreme Court of Illinois on the ground that the said writ of error was taken for delay only and that the question brought up by the writ is so frivolous as not to need further argument.

The writ of error in this case was allowed by Mr. Justice Brown on the 23rd day of April, 1901, and directed the clerk of the Supreme Court of Illinois to transmit the record to this court within thirty days from that date. On the 4th day of May, 1901, the defendant

in error, the Farmers' Loan and Trust Company, served notice upon counsel for plaintiff in error that on the 13th day of May, at the opening of court, they would present the motions above referred to, and at the same time delivered to us printed copies of said motions and suggestions in support thereof and of printed parts of the record relating to said motion. The printed parts of the record referred to consist of the mandate of this court to the Supreme Court of Illinois, the order of the Supreme Court of Illinois entered upon said mandate, the motion of the plaintiff in error for leave to file a supplemental transcript in the Supreme Court of Illinois (made on the ground that it was material to be considered on the hearing of the motion made by the Farmers' Loan and Trust Company for a mandate in accordance with the mandate of the Supreme Court of the United States), the petition for writ of error and the assignment of errors.

It is impossible to discuss the questions involved in this motion in the absence of certain parts of the record not printed by the defendant in error. The question to be determined on this writ of error is whether the Supreme Court of Illinois erred in remanding the cause to the Superior Court of Cook County, Illinois, under the mandate of this court, with directions to dismiss the bill of complaint, thereby setting aside not only that part of the decree reversed by this court, but also other parts of the decree which stand affirmed.

In order to show that this writ of error has not been taken out for delay and that the questions presented are not frivolous, it is necessary for the court to have before it the bill of complaint, the original decree entered in the Superior Court, the proceedings had in the cause after

this decree was affirmed by the Supreme Court of Illinois and before any writ of error was sued out by the Farmers' Loan and Trust Company. All of these things must be considered and the opinion of this court read in the light of all the facts in the case and the questions actually passed upon. As counsel has not printed such parts of the record as it is necessary for the court to consider in passing on the motions, the court should not at this time consider the merits of the case, but allow us to make the full argument that we deem necessary on the hearing of the case. We think it is clear, however, that none of the motions made by the defendant in error should be sustained.

I.

THE MOTION SHOULD BE DENIED FOR THE REASON THAT THREE WEEKS' NOTICE THEREOF, AS REQUIRED BY THE RULES, HAS NOT BEEN GIVEN COUNSEL FOR PLAINTIFF IN ERROR.

Rule 6 of this court provides that all motions to dismiss writs of error and appeals, except motions to docket and dismiss under rule 9, must be submitted at the first instance on printed brief or arguments, and that the party moving to dismiss shall serve notice of the motion with a copy of his brief or argument on counsel for plaintiff in error of record in this court at least three weeks before the time fixed for submitting the motion in all cases except when counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least sixty days.

The rule is plain that before this application can be presented to the court by the defendant in error at least three weeks' notice thereof should have been given us. As

a matter of fact but nine days' notice was given, and the motions should on that ground be denied. We made a motion to be allowed the time allowed by the rules to file a brief in opposition to the motions. The court having granted us five days' time we shall present the matter as best we can within the limited time.

II.

THE MOTIONS SHOULD BE DENIED FOR THE REASON THAT THE TRANSCRIPT HAS NOT YET BEEN FILED IN THIS COURT AND THE PARTS THEREOF NECESSARY TO BE CONSIDERED ON THESE MOTIONS PRINTED.

It is said by counsel for defendant in error that before they had prepared their suggestions they had been informed by a letter from counsel for plaintiff in error that the record was then on its way to Washington, in accordance with the practice in such cases, but that since writing the suggestions they had been informed by that counsel that he did not intend to file the record in time for these motions. The letter referred to was not intended to and did not in fact mislead counsel in any way, and this attempt to put us in a false position before the court is petty. The letter, it appears, was written April 25th. That was the day before the writ of error was lodged in the office of the clerk of the Supreme Court of Illinois, and counsel could not have understood that the record was then actually in transit. It was said in the letter—and counsel knew and understood the letter to mean —that the writ of error had been sent to the clerk of the Supreme Court of Illinois, who would send the record in due course. We presume that as soon as completed it will be sent in obedience to the writ of error.

We have never made the statement that it was not our intention to file the record in time for these motions.

We know nothing about the transcript filed by counsel except what may be learned from the index inserted at the beginning of the printed matter. If that is all that the record so filed contains it is not complete, and we do not believe that the clerk has certified it as a complete transcript of the record. The certificate of the clerk is not printed, and we have no knowledge on the subject. Very material parts of the record are omitted from this transcript which has been filed, all of which are absolutely necessary for the determination of these motions. The clerk of the Supreme Court of Illinois is not required, under this writ of error, to transmit the record until May 23, 1901. The court cannot hear and determine these motions without having the complete record on file and the parts material to this application printed. The application of the defendant in error to dismiss the writ or to affirm the judgment is, therefore, premature. It is said that this practice is expressly authorized in *Clark* v. *Hancock*, 94 U. S., 493.

In that case the final judgment was rendered on October 3, 1876, and the writ of error issued November 1, 1876, returnable to the October term, 1877, nearly one year after the issuing of the writ of error. In the present case the copy of the record must be filed within thirty days after the issuing of the writ of error, and there is no necessity for passing upon the motion at this time in order to prevent delays and expense. The transcript filed by the defendant in error is not a complete one, and should not be considered.

III.

THE MOTION TO DISMISS SHOULD BE DENIED FOR THE REASON THAT THE COURT HAS JURISDICTION IN THIS CASE.

It will be noticed that the motion to vacate the supersedeas and to dismiss the writ of error is not argued by counsel and no reason is presented in support of these motions, but every proposition discussed in the suggestions filed is directed to the question as to whether or not the Supreme Court of Illinois decided correctly in remanding the cause to the Superior Court of Cook County, Illinois, with directions to dismiss the bill of complaint, and whether or not the order of the state court was in conformity with the mandate of this court. The entire discussion has reference only to the motion to affirm on the ground that the writ of error was taken out for delay and that the questions presented are frivolous. It is conceded that the court has jurisdiction of this cause, and the motion to dismiss the writ of error should therefore be denied. The question as to whether the supersedeas should be vacated is controlled by the question as to whether the writ of error should be dismissed. If the writ of error is not dismissed the supersedeas should stand. If, on the other hand, the writ of error should be dismissed, the supersedeas would by that action of the court fail.

There is no question but that there is a Federal question involved in this case. The question is, whether the Supreme Court of Illinois has given proper effect to the judgment of this court reversing the judgment of the Supreme Court of Illinois. Such a question is a Federal question.

In the case of *Martin* v. *Hunter's Lessees*, 1 Wheaton, 562, which was a writ of error from the Court of Appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court requiring the judgment rendered in the cause to be carried into due execution, the court, speaking through Mr. Justice Story, said:

"In causes remanded to the Circuit Courts if the mandate be not correctly executed, a writ of error or appeal has always been supposed to be a proper remedy and has been recognized as such in the former decisions of this court. The statute gives the same effect to writs of error from the judgments of state courts as of the Circuit Courts, and in its terms provides for proceedings where the same cause may be a second time brought up on writ of error to the Supreme Court. There is no limitation or description of the cases to which a second writ of error may be applied, and it ought therefore to be co-extensive with the cases which fall within the mischiefs of the statute."

In the case of *Perkins* v. *Fourniquet*, 14 How., 329, it was held that an appeal lies to this court to correct a mistake made by the Circuit Court in executing the mandate of this court.

In the case of *Hinckley* v. *Morton*, 103 U. S., 764, it was held that second appeals have always been allowed to bring up proceedings subsequent to the mandate and not settled by the terms of the mandate itself.

In the case of *Mackall* v. *Richards*, 112 U. S., 369, it was held that where a mandate of this court directed further proceedings to be had in the court below as would be consistent with right and justice, and the court below thereafter made a decree which prejudiced substantial rights of a party to the suit in respect of matters not concluded by the mandate, its action touching such matters is subject to review upon a second appeal.

In the case of *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S., 141, the court said:

"It is argued by counsel for the defendant in error that this does not embrace any Federal question; that the effect to be given to a judgment or decree of the Circuit Court of the United States sitting in Louisiana by the courts of that state is to be determined by the law of Louisiana or by some principle of general law, as to which the decision of the state court is final, and that the ruling in question did not deprive plaintiffs in error of 'any privilege or immunity specially set up or claimed under the constitution or laws of the United States.' But this is an error. The question whether a state court has given due effect to a judgment of a court of the United States is a question arising under the constitution and laws of the United States and comes within the jurisdiction of the Federal courts by proper process, although, as was said by this court in *Dupessor* v. *Rochereau*, 21 Wallace, 130–135, 'No higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgment of the state courts in a like case and under similar circumstances. *Embry* v. *Palmer*, 107 U. S., 3.' It may be conceded that the judgment and decrees of the Circuit Court of the United States sitting in a particular state in the courts of that state are to be accorded such effect, and such effect only, as would be accorded in similar circumstances in a state tribunal of equal authority, but it is within the jurisdiction of this court to determine in this case whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question."

In *In re Blake et al.*, 175 U. S., 114, it was held that writ of error is the proper remedy to test the question as to whether the state court correctly construed the opinion of this court.

That was a petition for mandamus to compel the Supreme Court of Tennessee to enter a certain decree in a case which had been appealed to this court, and which

judgment was by this court reversed and the cause remanded to the Supreme Court of Tennessee for further proceedings not inconsistent with the opinion. The plaintiffs in error insisted that the Supreme Court of Tennessee had not complied with the mandate of this court. It was held that a writ of mandamus could not issue to compel the Supreme Court of Tennessee to enter the decree desired by the plaintiffs in error, but that the remedy on error was the proper remedy. In an opinion by Chief Justice Fuller the court said:

"The writ of mandamus cannot be issued to compel a judicial tribunal to decide a matter within its discretion in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction nor to be used to perform the office of an appeal or writ of error. And it only lies as a general rule where there is no other adequate remedy. As respects the Federal court it is well settled that where the mandate leaves nothing to the judgment or discretion of the court below, and that court mistakes or misconstrues the decree or judgment of this court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal or writ of error if involving a sufficient amount, or by writ of mandamus to execute the mandate of this court. *City Bank of Fort Worth* v. *Hunter*, 152 U. S., 512; *In re Sanford Fork and Tool Company*, 160 U. S., 247; *In re Potts*, 166 U. S., 263.

Nevertheless, without inquiring whether the conclusions of the Supreme Court of Tennessee were not in harmony with the views expressed by this court, we are of opinion that the remedy of petitioners for the alleged error in the decree of that court, if any, is by writ of error and not by mandamus. The remedy on error is not only entirely adequate and open to be sought unrestrained by the amount involved, but in respect of dealing with state tribunals is manifestly the proper remedy."

There being no question of the jurisdiction of the court, the motion to dismiss the writ of error and to vacate the supersedeas should be denied.

IV.

THERE IS NO COLOR FOR THE MOTION TO DISMISS, AND THE MOTION TO AFFIRM SHOULD NOT BE CONSIDERED.

When this case was here before on the writ of error taken out by the Farmers' Loan and Trust Company from the judgment of the Supreme Court of Illinois, a motion was made by this plaintiff in error, one of the defendants in error in that case, to dismiss the writ of error, and the same counsel who have filed the motion to dismiss the present writ of error or to affirm filed a brief in opposition to our motion to dismiss or affirm, in which they used the following language:

"Counsel have united with their motion to dismiss a motion to affirm under the rule authorizing such motion. The rule of court under which the motion is made provides that a motion to affirm may be joined with a motion to dismiss. It was not, however, the intention of this rule to give a party a right to simply make a written motion to dismiss and, adducing no reason or authority in support of it, immediately abandon it and hang upon it a motion to affirm. It is settled by a long line of decisions of this court that if there is no color for the motion to dismiss, that is, if this court clearly has jurisdiction of the writ of error the court will deny the motion to affirm without inquiring into the merits of the case. Otherwise, it would be in the power of a defendant in error in every case, by making a motion to dismiss and uniting with it a motion to affirm, to obtain a hearing and decision of this court upon the case in advance of its being reached on the docket and thus in effect advance the case by the motion to dismiss or affirm."

And counsel cited in support of this contention the following cases:

Whitney v. *Cook*, 99 U. S., 607.

School District v. *Hall*, 106 U. S., 428.
Davies v. *Corbin*, 113 U. S., 687.
New Orleans v. *L. C. Co.*, 129 U. S., 45.

We might cite in this connection the following additional authorities:

Metcalf v. *The Alaska*, 130 U. S., 201.
Walston v. *Nevin*, 128 U. S., 578.
Douglas v. *Wallace*, 161 U. S., 346.
Richards v. *Mackall*, 113 U. S., 539.

In *Whitney* v. *Cook*, 99 U. S., 607, the court said:

"This is a motion to affirm only. Our amended rule does allow a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record at least some color of right to a dismissal. That is not pretended in this case. We are therefore compelled to deny the motion."

In *School District* v. *Hall*, 106 U. S., 428, the court said:

"There is not in this case such a color of right to a dismissal as to make it proper for us to consider the motion to affirm."

In *Davies* v. *Corbin*, 113 U. S., 687, the court said:

"The original rule allowing a motion to affirm to be united with a motion to dismiss was promulgated May 8, 1876, 91 U. S., VII, and in *Whitney* v. *Cook*, 99 U. S., 607, decided during the October term, 1878, it was ruled that the motion to affirm could not be entertained unless there appeared on the record at least some color of right to a dismissal. This practice has been adhered to ever since, and in our opinion prevents our entertaining the motion to affirm in this case. The motion is consequently denied."

In *New Orleans* v. *La. Construction Co.*, 129 U. S., 45, a motion was made to dismiss or affirm, and the court, after holding that the judgment was properly reviewable upon writ of error, said:

"The motion to dismiss is therefore denied, and as we do not think there was color for it, the motion to affirm must be denied also."

In the case of *The Alaska*, 130 U. S., 201, a motion was made to dismiss or affirm. The court held that there was sufficient color for the motion to dismiss and that therefore they were warranted in entertaining the motion to affirm.

In the case of *Walston* v. *Nevin*, 128 U. S., 578, it was held that the motion to dismiss could not be sustained, but it is expressly held by the court there was color for the motion, and that being so, they were permitted to inquire into the propriety of granting the motion to affirm.

In the case of *Douglas* v. *Wallace*, 161 U. S., 346, it was held that while the claim of a Federal question was not so clearly frivolous to to authorize the court to dismiss the case, still as there was color for the motion to dismiss, the court was anthorized to proceed with the consideration of the questions involved.

It is nowhere argued by counsel that there is any color for the motion to dismiss this writ of error, and the record nowhere shows that there are any facts in the case which give color to the motion to dismiss. In fact, under the authorities we have cited we have shown conclusively that there is no color for the motion.

It being conceded, therefore, that the court has jurisdiction of this writ of error. and it nowhere appearing that there is any color for the motion to dismiss, we insist that the court should deny the motion to affirm without inquiring into the merits of the case.

V.

THERE IS NO SHOWING MADE THAT THIS WRIT OF ERROR WAS TAKEN OUT MERELY FOR DELAY.

Even if the court should be of the opinion that there is color for the motion to dismiss, yet before it will entertain the motion to affirm it must be satisfied that the writ of error was taken out for delay, or else that the questions brought up by the writ of error are frivolous. The only statement made by counsel on the question of delay is that the entire history of the litigation, as it appears in the different opinions of the different courts, shows plainly that the object of the Superior Court suit was to prevent or delay the foreclosure case, and that from a general glance at the entire controversy this purpose in instituting and pressing the Superior Court case stands out prominent; that the present writ of error is but a continuation of that policy, and that, therefore, the motion to affirm on the ground that the writ of error is taken on frivolous grounds and for delay should be granted. There is nothing to show that the Superior Court case was instituted for the purpose of delaying or hindering the foreclosure suit. We insisted on the argument of the previous writ of error in this case that the bill in no way sought to interfere with the Federal court. The bill had absolutely nothing to do with the foreclosure suit. It was sought to remove the trustee on the ground that it had not complied with the laws of the State of Illinois, and also that it was abusing its powers, but whatever may have been the purpose of this bill the present writ of error in no way hinders or delays the Farmers' Loan and Trust Com-

pany in the prosecution of any litigation between it and this plaintiff in error. As soon as the mandate was issued from this court and long before the order now complained of was entered by the Supreme Court of Illinois, the Farmers' Loan and Trust Company made a motion before Judge Grosscup, of the United States Circuit Court, for the appointment of a receiver for the plaintiff in error. The matter was heard and taken under advisement by the court. Before any decision had been rendered The Lake Street Elevated Railroad Company settled the entire controversy with the bondholders who were pressing the foreclosure suit and in fact all litigation concerning the Lake Street Company and its cantankerous bondholders has been settled and the various suits dismissed. All of the bonds that were provided to be sealed have been deposited under the sealing arrangement. Not a single bondholder of the Lake Street Company desires the retention of the Farmers' Loan and Trust Company as trustee under this mortgage. The Farmers' Company, by its action in this matter, has placed upon the Lake Street Company an enormous burden which it would not have been compelled to bear if the Farmers' Company had justly and fairly acted in this matter according to the true interests of its *cestuis que trust* and the Lake Street Company. The foreclosure case is now on reference before Master in Chancery Bishop to determine simply and only the question of the amount of the fees due to the Farmers' Loan and Trust Company as counsel in the foreclosure litigation. When this is determined the foreclosure suit is to be dismissed. With the dismissal of the foreclosure case we are entitled to have this trustee stand from under and allow the bondholders and the *cestuis que trust* to have a trustee that will

fairly represent the various interests. The supersedeas granted in this case does not prevent it in any way from taking any steps it may desire to enforce the collection of its fees and allowances. 'n fact, testimony has been taken under this order of reference since the supersedeas was granted in this case. Its only office is to prevent the entry of the order in the Superior Court dismissing this bill. It does not tie the hands of the Farmers' Loan and Trust Company in any other way and is not productive of any delay whatever.

VI.

IT IS NOT SHOWN THAT THE QUESTIONS PRESENTED BY THIS WRIT OF ERROR ARE FRIVOLOUS.

The discussion of this question involves to a large extent a discussion of the merits of the case, and it will be necessary to refer to parts of the record that have not been filed or printed by the defendant in error. The essential facts in the case are as follows:

On the 30th day of January, 1896, The Lake Street Elevated Railroad Company filed its bill of complaint in the Superior Court of Cook County, Illinois, against the Farmers' Loan and Trust Company, the American Trust and Savings Bank and the Northern Trust Company, averring that it was incorporated under the general railroad act of the State of Illinois in August, 1892, and that on April 7, 1893, it made and delivered a certain mortgage or deed of trust to the American Trust and Savings Bank as trustee and the Farmers' Loan and Trust Company as co-trustee; that at the time said mortgage was made the Farmers' Loan and Trust Company had not or had it since complied with the laws of Illinois requiring a deposit with the au-

ditor of public accounts for the benefit of the creditors of said company of the sum of $200,000 in stocks of the United States or municipal bonds of this state, or in mortgages on improved and productive real estate of this state, in accordance with the statute in such case made and provided; that the Farmers' Loan and Trust Company was doing business in this state under and by virtue of the authority claimed to be vested in it under said mortgage; that under and by virtue of said mortgage there were certified and delivered to the Farmers' Loan and Trust Company and the American Trust and Savings Bank, trustees under said mortgage, 6,500 bonds of $1,000 each, and that additional bonds were issued under the provisions thereof. That since the making of said mortgage the complainant had built and was then operating a railroad in the City of Chicago, commonly known as an elevated railroad; that it had been unable to earn sufficient money in operating its said railroad to pay interest upon the indebtedness secured by said mortgage, and that one William Ziegler had been conspiring and confederating with various persons, altogether representing 610 bonds of the total issue of 7,574 bonds, and had made a demand upon the Farmers' Loan and Trust Company and the American Trust and Savings Bank to proceed to foreclose said mortgage by virtue of the powers contained therein, and that notwithstanding that no other person was asking or demanding any action or proceeding on behalf of the other bondholders than said 610 bonds, the Farmers' Loan and Trust Company proposed to and would proceed to file a bill to foreclose said mortgage. It was also alleged that it was the desire and wish of the holders of over 6,500 bonds of the complainant, issued under said trust deed, that the Farmers' Loan and Trust Company should take no action to foreclose the

same, but that it should be removed from its position as trustee under said mortgage; first, for failure to comply with the laws of Illinois; and second, for assuming to act or take proceedings under said mortgage contrary to and in violation of the request of the holders of the majority of the bonds issued under said mortgage. The prayer of the bill was, first, that said trustee might be removed and a new trustee appointed by the court to act under and by virtue of said mortgage or deed of trust in place of the Farmers' Loan and Trust Company; second, that an injunction *pendente lite* might be issued restraining and enjoining the Farmers' Loan and Trust Company from taking any proceedings or bringing or prosecuting any suits, or acting in any manner whatever under and by virtue of the terms, provisions and conditions of said mortgage; and that upon the final hearing said injunction might be made perpetual; and third, that the complainant might have such other, further and different relief as equity might require.

On January 31, 1896, the Farmers' Loan and Trust Company filed a petition and bond for the removal of said cause to the Circuit Court of the United States. This petition was denied, and afterwards the Farmers' Loan and Trust Company filed a general appearance and answer in said case.

The cause came on for trial in the Superior Court, and on the 4th day of June, 1896, a final decree was entered in said cause.

After finding the facts in the case, the decree ordered:

First, that the Farmers' Loan and Trust Company be and it was thereby removed as trustee or co-trustee under

the said mortgage or deed of trust executed and delivered by the complainant, The Lake Street Elevated Railroad Company.

Second, that the Farmers' Loan and Trust Company, its agents, attorneys, officers and servants, and each of them, be and they were thereby perpetually enjoined and restrained from taking any proceedings or bringing or prosecuting any suit or suits to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings Bank and said Farmers' Loan and Trust Company, or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust, so made, executed and delivered by the said complainant, The Lake Street Elevated Railroad Company, to said defendant, the American Trust and Savings Bank, as trustee, and the said defendant, the Farmers' Loan and Trust Company, as co-trustee.

Third, that the American Trust and Savings Bank, as trustee, do and it was thereby ordered and directed to appoint by an instrument in writing, within thirty days from the date of the entry of said decree, a co-trustee under the said mortgage or deed of trust, so made, executed and delivered by the complainant as aforesaid, in place of the said defendant, the Farmers' Loan and Trust Company, and that upon the appointment of such successor, such successor should, upon accepting said appointment, be and become vested with all the property rights, duties and trusts of the trustee named under said trust deed, and with all the right, title and interest of the said Farmers' Loan and Trust Company under said trust deed.

Fourth, that upon the failure of the American Trust and Savings Bank to make the appointment as aforesaid

within thirty days, the court reserved the power, right and authority to appoint a co-trustee as successor to the Farmers' Loan and Trust Company, and for the purposes aforesaid and for all other purposes deemed by the court necessary and proper, to enforce said decree and all the provisions thereof, the court expressly reserved unto itself jurisdiction of the cause and jurisdiction of all the parties thereto.

From this decree an appeal was taken by the Farmers' Loan and Trust Company to the Appellate Court of Illinois in and for the First District, where said decree was affirmed.

> *Farmers' Loan and Trust Company* v. *Lake Street Elevated Railroad Co.*, 68 Ill. App., 666.

From the judgment of the Appellate Court an appeal was taken to the Supreme Court of Illinois, where the judgment of the Appellate Court was affirmed on the 18th day of June, 1898.

> *Farmers' Loan and Trust Company* v. *Lake Street Elevated Railroad Co.*, 173 Ill., 439.

After the judgment had been affirmed by the Supreme Court of Illinois the order of affirmance of that court was duly filed as required by law, and thereupon and on the 24th day of June, 1898, after due notice to counsel for the Farmers Loan and Trust Company, the Superior Court of Cook County, Illinois, entered a supplemental decree confirming the appointment by the American Trust and Savings Bank of the Equitable Trust Company as co-trustee in place of the Farmers' Loan and Trust Company, and said The Equitable Trust Company was by said de-

cree vested with all the property, rights, duties and trusts of a trustee under said trust deed, with like effect as if named as trustee therein, and with all the right, title and interest of the Farmers' Loan and Trust Company under said trust deed.

After the entry of the supplemental decree by the Superior Court of Cook County, Illinois, the Farmers' Loan and Trust Company prosecuted a writ of error from this court to the Supreme Court of Illinois, and thereafter this court on March 26, 1900, reversed the judgment of the Supreme Court of Illinois affirming the original decree of the Superior Court of Cook County, Illinois; and remanded said cause to the Supreme Court of Illinois for proceedings not inconsistent with the opinion.

Farmers' Loan & Trust Co. v. *Lake Street Ele. R. R. Co.*, 177 U. S., 51.

On the 2nd day of March, 1901, the Farmers' Loan and Trust Company filed the mandate of this court in the office of the clerk of the Supreme Court of Illinois, and on April 10, 1901, moved the Supreme Court of Illinois to reverse its said judgment entered in this cause and to remand said cause to the Superior Court of Cook County, Illinois, with directions to dismiss the bill of complaint. On the 17th day of April, 1901, the Supreme Court of Illinois issued its mandate as prayed by the Farmers' Loan and Trust Company.

Our position is that the order of the Supreme Court of Illinois remanding the cause to the Superior Court of Cook County with directions to dismiss the bill is inconsistent with the opinion of this court in this cause, for the reason that the only matter decided was that the Supreme Court of Illinois erred in affirming the decree of the Su-

perior Court of Cook County, Illinois, only in so far as said decree enjoined the Farmers' Loan and Trust Company from prosecuting the bill of foreclosure which had been filed in the Circuit Court of the United States before the commencement of this suit in the state court. But that in so far as the other provisions of the decree of the Superior Court are concerned, they still remain in full force and effect. And further, that the effect of the order of the Supreme Court of Illinois directing the dismissal of the bill interferes with vested rights of third parties.

The Supreme Court of Illinois should only have directed the Superior Court to set aside that part of the decree enjoining the prosecution of the foreclosure suit pending in the Federal court.

An examination of the proceedings and opinions of the various courts which have rendered decisions in this cause will show that the question as to whether the Superior Court of Cook County, Illinois, had a right to retain jurisdiction over the cause was one of the questions involved. It was contended on behalf of the Farmers' Loan and Trust Company that because it had filed a petition and a bond for removal of the cause to the Circuit Court of the United States, the court had lost jurisdiction over the cause and its decree was a nullity.

This was the first point passed on by the Supreme Court of Illinois in its opinion, and it was held that there was no error in the action of the trial court in denying the petition for removal. Upon this question it is said in the opinion of the Supreme Court of the United States:

"Whether the state court erred in refusing to accept

the petition and bond filed by the plaintiff in error, the Farmers' Loan and Trust Company, for removal of the cause to the Circuit Court of the United States, and whether the Lake Street Elevated Railroad Company, the American Trust and Savings Bank and the Northern Trust Company, by appearing in the Circuit Court, by moving to remand, by demurring to the bill after such motion had been overruled, and by appealing to the Circuit Court of Appeals, were estopped from proceeding in the state court are questions which have been argued at length before us, but which, for reasons presently to be stated, we have not found it necessary to decide."

It will be seen that this court did not reverse the holding of the state court that the cause never was, in fact, removed to the Circuit Court of the United States and that the Superior Court had jurisdiction of the subject-matter and the parties.

t is argued by counsel that if this court was of the opinion that any part of the decree of the Superior Court should stand it would have been necessary to pass on the question whether or not the state court had jurisdiction after the petition and bond for removal had been filed, and as that question was not passed upon the entire decree was by this court set aside. This position is not tenable. In the first place, this court in refusing to pass on the question, affirmed the State Court on the question of its jurisdiction, and besides that the record shows that the Farmers' LoanLoan and Trust Company entered a general appearance after withdrawing its limited appearance filed under protest and filed an answer and submitted to the jurisdiction of the Superior Court. In the next place, it was not necessary for this court to pass on the question of removal in order that a part of the decree might be sustained. Counsel has fallen into the error of assuming that the subject-matter of the bill filed in the Superior

Court was the enjoining of the prosecution of the foreclosure suit. It is true that it was held by this court that the foreclosure case was prior in time, but it does not follow the Federal court had thereby acquired jurisdiction of the "entire matter" as counsel terms it, involved in the state court case.

We fail to find any holding in the opinion of this court that every question raised in the Superior Court case could have been and should have been raised by answer or cross-bill in the foreclosure suit pending in the Circuit Court of the United States, as argued by counsel. The holding was that the legal competency of the trustee to act as trustee in the foreclosure proceeding and the right and expediency of a foreclosure proceeding are the matters which can properly be raised and determined in the Circuit Court of the United States, but the bill filed in the Superior Court and the decree entered thereon was much more far-reaching. The bill not only attacked the legal competency of the trustee to act, but sought in addition to have it removed from office and to have a successor appointed, and the decree so ordered. The argumena of counsel is a virtual concession that the decree so far as the removal of the trustee and the appointment of a successor are concerned, should stand unaffected by the opinion of this court, if the matters set up in the bill could not be raised by answer or cross-bill in the foreclosure suit. It is clear that these matters could not be set up by answer for the reason that no affirmative relief can be granted to a defendant on an answer alone.

This has been decided in many cases in this state.

Tarleton v. *Vietes*, 1 Gilman, 470.
Edwards v. *Helm*, 4 Scam., 143.
McConnel v. *Hodson*, 2 Gilman, 640.

Mason v. *McGirr*, 28 Ill., 322.
McCagg v. *Heacock*, 42 Ill., 153.
Hanna v. *Ratekin*, 43 Ill., 462.
Tittsworth v. *Stout*, 49 Ill., 78.
Conwell v. *McCowen*, 53 Ill., 363.
Howett v. *Selby*, 54 Ill., 151.
International Bank v. *Wilshire*, 108 Ill., 143.
Anderson v. *Henderson*, 124 Ill., 164.

Neither could these matters be set up by cross-bill, because the only matters that can be investigated by a cross-bill are those that are germane to the original bill. While a defendant has a right to file a cross-bill and state new facts connected with the subject-matter of the original bill, yet the cross-bill must relate exclusively to the subject-matter of the bill and things connected therewith and foreign matter cannot be interposed.

Gage v. *Mayer*, 117 Ill., 632.
Lund v. *Skanes E. Bank*, 96 Ill., 181.
Morrison v. *Morrison*, 140 Ill., 560.

In Story on Equity Pleadings, Sec., 401, it is said:

"A cross-bill should not introduce new and distinct matters not embraced in the original suit, for as to such matters it is an original bill and they cannot properly be examined at the hearing of the first suit."

The only matter that could be raised by way of defense in the foreclosure suit and the only matter suggested by this court in its opinion as proper to be raised in that suit, was the competency of the trustee to act as complainant in that suit and its right to bring the foreclosure suit. If a defense of this kind was successful it would only result in an abatement of the suit and not the re-

moval of the Farmers' Loan and Trust Company as trustee and the appointment of a successor. This could only be done by another and independent proceeding. In other words, even if it had been held in the foreclosure suit that the Farmers' Loan and Trust Company was not authorized to bring the suit and that it was not expedient to enforce the provisions of the mortgage, that would not remove the trustee and appoint a successor.

The two suits did not relate to the same controversy. The one was a suit to foreclose a mortgage, the other to remove a trustee and appoint a successor. They were entirely distinct controversies. The Superior Court in the execution of its decree enjoined the prosecution of the foreclosure suit, and in that respect, and as held by this court, in that respect only, the decree was erroneous. The Federal court had the power to go on and determine all matters relating to the foreclosure of the mortgage. At the time the bill of foreclosure was filed the Farmers' Loan and Trust Company was the trustee under the mortgage, and it had the right to prosecute to a final determination all matters that had been put under way by it as trustee, notwithstanding the bill that had been filed to remove it, and irrespective of the final outcome of that case, and the mere fact that the Farmers' Loan and Trust Company had begun a prior suit in a Federal court is no reason why the railroad company had not the perfect right to have other and distinct controversies decided in the state court. The enforcement of the Superior Court decree, with the exception of that part enjoining the prosecution of the foreclosure suit, in no way hindered the Farmers' Loan and Trust Company from proceeding with the foreclosure and prosecuting it to a final determination. With the injunction out of the way, it is not,

as argued by counsel, removed *as complainant* in the foreclosure suit, even though it is removed as trustee under the mortgage. The decree does not affect what had been already done by the trustee as such, or the prosecution and determination of any suit begun by it as such trustee.

The question as to what mandate should have been issued to the Superior Court of Cook County in obedience to the opinion of this court must be determined on the assumption that the state court had full jurisdiction over the parties and the subject matter of the controversy. The subject-matter of the controversy was as to whether the Farmers' Loan and Trust Company should be removed as trustee under the mortgage and a new trustee appointed. Upon that subject nothing is said by this court.

It is manifest that the holding of the state court that the Farmers' Loan and Trust Company was properly removed as trustee for failure to comply with the statutes of the State of Illinois was not reversed. It was held that jurisdiction in the foreclosure proceedings had attached before the suit filed to remove the Farmers' Loan and Trust Company had been commenced, and that it was not competent for the state court to interfere by injunction with those proceedings. The language of the court on this question is as follows:

"As then the bill of foreclosure had been filed in the Circuit Court of the United States and the jurisdiction of that court has thus attached before the commencement of the suit in the state court, it follows upon principle and authority that it was not competent for the state court to interfere by injunction or otherwise with the proceedings of the Federal court."

That the judgment of the state court was erroneous in enjoining the Farmers' Loan and Trust Company from proceeding with the foreclosure suit and interfering with the proceedings of the Federal court was the only question decided.

After the decision of this court, a motion was made by the Farmers' Loan and Trust Company in the foreclosure suit for the appointment of a receiver. In disposing of that matter on May 28, 1900, and in referring to the litigation between the parties in this particular case, Judge Grosscup said:

"The case that was before the Supreme Court was an action that was brought in the Superior Court of this county to remove the Farmers' Loan and Trust Company as trustee, and to enjoin any proceedings by it in the way of foreclosure or otherwise that it might be about to take."

Showing that in the judgment of Judge Grosscup the proceeding involved two questions: First, the removal of the Farmers' Loan and Trust Company as trustee; and second, the enjoining of the foreclosure proceedings.

The court then said:

"Of course the case went to a decree in the Superior Court and was affirmed by the Appellate Court and was affirmed again by the Supreme Court, upon the theory that the state court had acquired jurisdiction prior to jurisdiction having been acquired by the Federal court in this foreclosure proceeding. The Supreme Court of the United States, in reviewing the action of the State Supreme Court, held that in that respect, at least, the state courts were in error; that the Federal court upon the foreclosure bill had obtained jurisdiction before the case was brought in the state court, and that therefore the case in the state court was an attempt to preclude the Federal court from proceeding with its foreclosure proceeding after it had obtained jurisdiction in the foreclosure case. For that reason the order of

the state court, as affirmed by the Supreme Court of the state, has been annulled by the Supreme Court of the United States. What is left of the state court order is not necessary for me now to determine. Whether if this proceeding should be discontinued that state court order would amount to an ouster of the Farmers' Loan and Trust Company as trustee, so that is could not bring a subsequent suit, I need not determine. That can be adjudged when the proper time comes. We are left then here in the situation of having jurisdiction of this case brought by the trustee to foreclose the mortgage for the non-payment of interest, and without any effectual impediment by reason of the action of the state court, so far as this suit is concerned."

It will be seen that Judge Grosscup held that the order of the state court enjoining the foreclosure proceeding was no longer an impediment.

There is only one clause in the decree of the Superior Court that in any way affects the foreclosure proceeding, and that is as follows:

"And it is further ordered, adjudged and decreed by the court that the said defendant, the Farmers' Loan and Trust Company, and its attorneys, solicitors, officers, agents and servants, and each and every of them, be and they are hereby perpetually enjoined and restrained from taking any procedure or bringing or prosecuting any suit or suits to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings Bank and said Farmers' Loan and Trust Company, or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust, so made, executed and delivered by the said complainant, The Lake Street Elevated Railroad Company, to the said defendant, the American Trust and Savings Bank, as trustee, and the said defendant, the Farmers' Loan and Trust Company, as co-trustee."

This is the only holding of the state court that has been reversed by the Supreme Court of the United States. In the conclusion of its opinion the court says:

"Our conclusion is that the Supreme Court of Illinois erred in its decree perpetually enjoining and restraining the Farmers' Loan and Trust Company, the plaintiff in error, from proceeding with or prosecuting teh said foreclosure suit in the Circuit Court of the United States and from acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of the said mortgage; that the Appellate Court of the First District of Illinois erred in affirming said decree, and that the Supreme Court of Illinois erred in affirming the judgment of said Appellate Court. Accordingly the judgment of the Supreme Court of Illinois is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion"

The error of the Supreme Court of Illinois was in restraining the Farmers' Loan and Trust Company from prosecuting the said foreclosure suit in the Circuit Court of the United States and from acting in any manner under the terms and provisions of said mortgage. It was not said or held that the Supreme Court of Illinois erred in ordering the trustee removed and a successor appointed. The only error was in the specific provision of the decree pointed out by this court.

This court did not pretend to reverse *in toto* the holding of the Supreme Court of Illinois. It only intended to and did reverse the holding of that court in so far as it affected the right of the Farmers' Loan and Trust Company to proceed with the foreclosure suit, and that only. The Superior Court of Cook County certainly had jurisdiction by due service of process and the entry of appearance by the Farmers' Loan and Trust Company over the parties and the subject-matter of the controversy. It declared that the trustee should be removed and a new trustee appointed. *If the foreclosure proceeding should proceed to final conclusion, and the property sold under a*

foreclosure decree, the appointment of a new trustee would be of no avail. But if the foreclosure proceeding should be dismissed or disposed of in any way without a sale of the property, then the trustee appointed under the decree of the Superior Court would be the acting trustee under the mortgage in place of the Farmers' Loan and Trust Company. As a matter of fact the scaling arrangement between the bondholders and the railroad company has now been completed, and the Northern Trust Company, the trustee under the scaling arrangement, is about to exchange the first mortgage bonds for the debenture bonds as provided for in that arrangement.

It would be the duty of the court to dismiss the foreclosure case upon payment of the interest past due. It was so held in *Bruce* v. *M. & K. R. R.*, 117 U. S., 514. Upon such dismissal the matter would stand as though no foreclosure bill had ever been filed.

As shown by the transcript, an order has been entered by Judge Grosscup in the foreclosure case referring the matter to a master in chancery solely and alone for the purpose of ascertaining the amount of fees due to the trustee in the foreclosure proceeding, upon the ascertainment and payment of which the court has announced that he would dismiss the foreclosure proceeding. Under these circumstances we are entitled to have the decree of the Superior Court stand, except in so far as it enjoined the prosecution of the foreclosure suit.

It is said by counsel that the judgment of this court is that the decree which removed the Farmers' Loan and Trust Company be reversed, and that if that decree is reversed that the Farmers' Loan and Trust Company is reinstated as trustee and there is no room for its successor. The opinion and mandate of this court does not

pretend to reinstate the Farmers' Loan and Trust Company as trustee, but only to allow it to proceed with the foreclosure suit, the prosecution of which was erroneously enjoined.

As this court did not pass upon the questions whether or not the state court had jurisdiction in the case and whether or not the Farmers' Loan and Trust Company was properly removed as trustee, except in so far as its removal affected the foreclosure suit pending in the Federal court, and as the finding of the lower court in these respects were not disapproved, it follows that those provisions of the decree still stand in full force, notwithstanding the contention of the defendant in error that the whole decree is reversed simply because the court used the word "reversed."

In *Gaines* v. *Rugg*, 148 U. S., 228, the Circuit Court of the United States entered a decree finding certain rent due plaintiff and that they recover of defendant possession of a certain lot, and that a writ of possession issue. The Supreme Court reversed this decree and ordered that the cause be remanded "for further proceedings to be had therein in conformity with the opinion of this court."

The Supreme Court held in its opinion (145 U. S., 141) that no error was committed by the Circuit Court in any matter relating to the possession of the land, but that error had been committed in the allowance of rent. The mandate was presented to the court below and a motion made for the entry of a decree. The court allowed defendant to take further testimony by way of defense to the title to the lot. On application for a writ of mandamus by plaintiff to compel the entry of the decree presented to the court, the Supreme Court said, at page 238:

"Because this court was dissatisfied with the decree in respect of the accounting, and only for that reason, it reversed the decree; but it remanded the causes to the Circuit Court with a direction, as the opinion and the mandate explicitly state, for further proceedings to be had there in conformity with the opinion of this court. It did not disturb the findings and decrees of the Circuit Court in regard to the title and possession, but only its disposition of the matter of accounting. The mandate and the opinion taken together, although they used the word 'reversed,' amount to reversal only in respect of the accounting and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects."

And again at page 240:

"It is, we think, very plain that so much of the decree of the Circuit Court of November 11, 1887, as was not disapproved by this court still stands in full force."

So in the case at bar the decree of the Superior Court finding it had jurisdiction, and that the Farmers' Loan and Trust Company should be removed from its office, and so ordering, was not disapproved by this court and still stands in full force and effect, and should not have been disturbed by the Supreme Court of Illinois, and the Supreme Court of Illinois erred in setting them aside, except in so far as said decree enjoined the prosecution of the foreclosure case.

It seems clear from a reading of the opinion in the light of all the facts of the case, that this court could not have intended by its opinion and judgment to do more than relieve the Farmers' Loan and Trust Company from the injunction part of the decree, so that it would be at liberty to prosecute the foreclosure suit to an end. Upon a dismissal of the foreclosure suit, then the appointment of a successor to the Farmers' Loan and Trust Company must certainly stand. The foreclosure suit is

now ready for dismissal when the question of fees is settled. The Lake Street Company and its bondholders should not be compelled to again bring suit to remove the Farmers' Loan and Trust Company as trustee, and we cannot believe that this court so intended.

The effect of the order of the Supreme Court of Illinois directing the dismissal of the bill is to interfere with vested rights of third parties.

It will be seen by an examination of the transcript of record that the decree of June 4, 1896, was fully executed and carried into effect prior to July 7, 1898, when the former writ of error was allowed by Justice Brown, of the Supreme Court. The writ of error only operated as a supersedeas from the time the same was lodged with the clerk of the Supreme Court of Illinois, on August 2, 1898, or at least from the time it was served on the Lake Street Elevated Railroad Company on July 11, 1898; but in either event the proceedings in the cause had not been stayed, for the supplemental decree of the Superior Court of Cook County was entered before any application was made for a writ of error. The Equitable Trust Company cannot be divested of the rights vested in it by the supplemental decree, for the record was a sealed book before any order was made to hold the same in abeyance for further proceedings by the Supreme Court of the United States.

The former writ of error in this case was taken out by the Farmers' Loan and Trust Company under section 709 of the judiciary act of the Revised Statutes of the United States.

Section 1007 of the judiciary act of the Revised Statutes of the United States provides that in any case where a

writ of error may be made a supersedeas, the defendant may obtain such supersedeas by serving such writ of error by lodging a copy thereof for the adverse party in the clerk's office where the record remains within sixty days, Sundays inclusive, after the rendering of the judgment complained of and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment he may, having served his writ of error as aforesaid, give the security as required by law, within sixty days after the rendition of such judgment, or afterward with the permission of the justice or judge of the appellate court, and in such cases where a writ of error may be a supersedeas execution shall not issue until the expiration of the (said term of 60) (10) days.

It has been decided, however, that the section of the statute last referred to does not apply to judgments of a state court, but has reference only to the judgments of the courts of the United States.

In the case of *Doyle* v. *Wisconsin*, 94 U S., 50, the Supreme Court of Wisconsin, on the 15th day of August, 1876, rendered a judgment ordering that a writ of mandamus issue forthwith, directed to the plaintiff in error, commanding him within twenty-four hours to recall the license given by him to the Continental Insurance Company of the City of New York to do business in that state. The writ was issued and served on the same day, and on the next day its command was obeyed. On the 10th of October following the writ of error was sued out and a bond given to operate as a supersedeas. The plaintiff in error moved that all the proceedings in execution of the judgment within ten days after its rendition might be vacated and set aside. In an opinion by Chief Justice Waite the

Supreme Court held that the provision for delay in execution referred only to judgments and decrees in the courts of the United States, and that it was not the intention of Congress to interfere at all with the practice of state courts as to executions upon their judgments until a supersedeas was actually perfected, and the court held that inasmuch as the writ of mandamus was rightfully issued and served before the supersedeas was served, the motion must be denied.

See, also,

Foster v. *Kansas*, 112 U. S., 201.

It is clear under these authorities that The Lake Street Elevated Railroad Company had the right immediately upon the affirmance of the decree of the Superior Court of Cook County, by the Supreme Court of Illinois, to have all the provisions of that decree immediately enforced.

It is also equally clear that the rights vested in the Equitable Trust Company under the supplemental decree have not been divested by the partial reversal of the judgment of the Supreme Court of Illinois by this court.

The case of *Board of Commissioners* v. *Gorman*, 19 Wall., 661, came to the Supreme Court on error to the Supreme Court of the Territory of Idaho, in which the board of commissioners of Boise County and one Davis, plaintiffs in error, asked that a writ might be issued commanding restoration of the said Davis to the office of assessor and tax collector of Boise County, for the reason that he had been ousted from that office by virtue of a writ issued on the judgment in the court below after the allowance of the writ of error to the Supreme Court of the United States which operated as a supersedeas.

The court, after calling attention to the statute, which

provides that a writ of error may operate as a supersedeas when a copy has been lodged in the clerk's office where the record remains and that execution cannot issue upon the judgment until the expiration of ten days from the entry thereof, says:

"In this case the record shows that the judgment was actually entered on the 20th day of January. The entry as made was read in court on the morning of the 21st and the record signed by the judges, but it was ordered to be made on the 20th. The ten days, exclusive of Sundays, prescribed by the act of Congress for delay of execution, expired on Saturday, the 31st day of January. On Monday, the 2nd day of February, a majority of the judges of the court directed the clerk to issue a writ of restitution to carry the judgment into effect. On the same day the chief justice of the court allowed a writ of error and signed the necessary citation. A copy of the writ of error was filed in the clerk's office and the writ and citation actually served upon the defendant in error before the clerk had completed the preparation of the writ of restitution. After he had completed its preparation he handed it to the attorney for the defendant in error who had been previously served with the citation. No supersedeas bond was filed with the clerk on the 2nd and no notice was given that any had been approved. On the morning of the 3rd of February the writ of restitution was served and Davis removed from his office. After this and on the same day a bond approved by the chief justice was left in the clerk's office by him. It nowhere appears from the record when this bond was approved. It bears date the 2nd of February, but there is no certificate of the time when the approval was entered. It is certain, however, that it was not filed in the clerk's office until after service of the writ of restitution. The writ of error operated as a supersedeas only from such filing. That was too late to prevent the removal of Davis from his office in pursuance of the authority of the judgment, and we cannot now order him to be restored."

If, as held in the above case, the court was powerless to restore Davis, it must be held that the Supreme Court

of Illinois was powerless to restore the Farmers' Loan and Trust Company as trustee under the mortgage. The principle decided in the above case is to the effect that if the decree has been fully carried into effect before service of the citation the courts cannot and will not interfere, but will leave the parties as the law finds them. And as the law finds that the Equitable Trust Company was appointed as trustee instead of the Farmers' Company it cannot be removed.

Counsel have stated in their suggestions that we contended before the Supreme Court of Illinois that no revision of the decree was possible and that the court was powerless to take *any* action under the mandate of this court. It is perhaps unnecessary to say that this statement of counsel is not supported by the record for the reason that our brief filed in the Supreme Court of Illinois is not a part of the record in this court. We did, as a matter of fact, contend in that court, as we contend here, that the court should not order the bill dismissed but should set aside the decree only in so far as it enjoined the prosecution of the foreclosure suit, for two reasons: 1, Because this court did not order any other part of the decree set aside; 2, Because a dismissal of the bill would interfere with vested rights of third parties under the decree.

It is said that the supplemental transcript showing the appointment of the Equitable Trust Company as trustee in place of the Farmers' Loan and Trust Company before the prosecution of the writ of error from the final judgment of the Supreme Court of Illinois was not considered by the Supreme Court of Illinois, for the reason that the action of the Superior Court in attempting to appoint a successor was void on the ground that less than

ten days' notice was given of the motion to redocket the case and the entry of said order.

In the first place, it appears counsel for the Farmers' Loan and Trust Company was present in court when this order was entered and made no objection to the entry thereof. Any right that he had to additional time was therefore waived.

In the second place, the statute of Illinois does not require ten days' notice of an application to redocket a case and to enter orders where the judgment is affirmed, but only in cases where the judgment is reversed. The section of the statute referred to by counsel is as follows:

"When any cause or proceeding, either at law or in chancery, is remanded by the Supreme Court or Appellate Court, as the case may be, for a new trial or hearing by the court in which such cause was originally tried, the Supreme Court or Appellate Court, as the case may be, shall issue its mandate reversing and remanding such cause directly to such trial court and upon a transcript of the order of the Supreme Court or Appellate Court, as the case may be, remanding the same, being filed in the court in which such cause was originally tried, and not less than ten days notice thereof being given to the adverse party or his attorney, the cause or proceeding shall be reinstated therein. In the case of non-resident parties or parties who cannot be found so that personal notice cannot be served upon them, the notice may be given as in cases of chancery or as may be directed by the court. In cases of reversal and remandment by the Supreme Court of any cause removed thereto from the Appellate Court, upon the filing in such Appellate Court of certificate of such reversal and remandment, the clerk of the Appellate Court shall have the right to issue a fee bill for all such costs as accrued in said Appellate Court and did not abide the final action in the Supreme Court."

It will be seen that there is nothing in this section of the statute which applies in any way to judgments which

are affirmed by the Appellate or Supreme courts of this state. It is only when judgments are reversed that the ten days' notice is required to be given before the cause can be redocketed. As this judgment was not reversed by the Supreme Court of Illinois, but, on the other hand, affirmed, it follows that this statute does not apply to this case. The section of the statute which applies to a case of this kind is as follows:

"When an appeal or writ of error shall be prosecuted from a judgment, order or decree to the Supreme Court or Appellate Court, and such appeal or writ of error is dismissed, or the judgment, decree or order is affirmed, upon a copy of the order of the Supreme Court or Appellate Court, as the case may be, being filed in the office of the clerk of the court from which the case was originally removed, execution may issue and other proceedings may be had thereon in all respects as if no appeal or writ of error had been prosecuted."

Sec. 83, Ch. 110, Revised Statutes of Illinois.

After the certified copy of the order of affirmance by the Supreme Court of Illinois had been filed in the Appellate Court and in the Superior Court, it operated as a *procedendo* and reinvested the Superior Court with jurisdiction to proceed in the cause in all respects as though no writ of error had been prosecuted.

Smith v. *Stevens*, 133 Ill., 183.
People v. *Wadlow*, 166 Ill., 119.
Rock Island National Bank v. *Thompson*, 173 Ill., 593 (611).

It will be seen, therefore, that the Lake Street Elevated Railroad Company had the right, immediately upon the filing of the order of affirmance in the Superior Court, to apply for the entry of this order, as if no appeal or

writ of error had been prosecuted. It cannot, therefoer, be contended that the Superior Court was without any jurisdiction at the time the supplemental decree appointing a new trustee was entered.

It is claimed by counsel for the defendant in error that the Equitable Trust Company obtained no rights under the decree entered after the judgment of the Supreme Court of Illinois for two reasons:

1st. Because it was not a *bona fide* purchaser for value;

2nd. Because the only title a party to the suit acquires is a voidable title subject to be defeated by the reversal of the decree.

Neither of these contentions can be sustained. The Equitable Trust Company stands in exactly the position of a *bona fide* purchaser for value. It is well settled that if the judgment is reversed the parties are to be restored to their original rights *so far as it can be done without prejudice to third persons*, but the rights of third persons are not affected and their title acquired to property under an erroneous judgment is not divested by the reversal, and this principle is extended not only to purchasers but to cases where legal rights have become vested although no sale has been made, which is the case here. This principle has been decided in several cases in this state.

In *Wadhams* v. *Gay*, 73 Ill., 415, the court said, in passing on this question:

"Nor is this principle confined to the case of judicial sales as being founded on the public policy of sustaining such sales. The same principle applies to judgments and decrees which simply declare and vest the legal title in the party claiming it where no sale has been made."

The same principle is reaffirmed in the case of *Hay* v.

Bennett, 153 Ill., 271, in which case the court said, on page 287:

"The ground of the decision in *Goudy* v. *Hall* (36 Ill., 313) was that since the Circuit Court had jurisdiction of the persons in interest and subject-matter, it was of no moment how erroneous the proceedings of the court may have been, the rights of third persons acquired under such proceedings were unreversed and, by virtue of them, must be protected. (See the subsequent case of *Wadhams et al.* v. *Gay*, 73 Ill., 415, and the numerous authorities there cited.) It was there in substance said that where a judgment or decree has been reversed, then, as between the parties to the litigation, they are all to be restored to their original rights, but that the rights of third persons are not affected, and, also, that this principle is not confined to the cases of judicial sales, but that it applies to judgments and decrees which simply declare and vest the legal title in the party claiming it."

See, also,

Montanye v. *Wallahan*, 84 Ill., 355.
Mulvey v. *Gibbons*, 87 Ill., 367.
Hannas v. *Hannas*, 110 Ill., 53.
Lambert v. *Livingstone*, 131 Ill., 161.
Hammond v. *People*, 178 Ill., 503.

So far as the other contention advanced by counsel is concerned, it is sufficient answer to say that the Equitable Trust Company was not and never has been a party to this suit. In addition to that fact, neither the Equitable Trust Company, nor any of the parties to the suit, had any notice at the time the supplemental decree was entered that the Farmers' Loan and Trust Company would apply for a writ of error from this court to the Supreme Court of Illinois to review the judgment of that court. The decree vesting title under the mortgage in the Equitable Trust Company was entered several days before any notice of application was given by the Farmers' Loan and Trust

Company that it would apply to this court for a writ of error. The Equitable Trust Company accepted the trust in reliance upon the absolute title given by the decree. It is true that in considering this question the date of the supersedeas obtained by the Farmers' Loan and Trust Company is immaterial, and it is also true that a writ of error is none the less *lis pendens* because there is no supersedeas, but in this case there was neither a writ of error nor a supersedeas nor any notice of an intention to apply for them until long after the supplemental decree was entered and the title to the property vested in the Equitable Trust Company.

When the case was here before, the supplemental decree entered before the former writ of error was allowed, which appointed the Equitable Trust Company as trustee in place of the Farmers' Loan and Trust Company, was not in the record and not before the court, the record embracing only the matters up to and including the judgment of the Supreme Court affirming the original decree. It might be that the court would not have reversed the Supreme Court of Illinois had the supplemental decree been before it. The supplemental decree is now before the court, and if the court should now be of the opinion that the judgment of the Supreme Court of Illinois should not be disturbed as the rights of third parties have intervened, then it is within the power of the court to recall the mandate already issued to the Supreme Court of Illinois, and to enter such an order in the case as it would have entered if the supplemental decree had been before it on the former writ of error.

It is finally argued by counsel that in any view the order to the Supreme Court of Illinois was not inconsist-

ent with the opinion of this court, for the reason that the Illinois Supreme Court was at liberty in remanding the cause to the Superior Court to give it such directions as it thought best; that this court left it entirely within the discretion of the Supreme Court of Illinois as to what order should be entered, so long as it was not inconsistent with its opinion, and that as the action taken was not inconsistent with the opinion of this court, this court cannot review that action even though it went further and was more radical than this court contemplated.

In the first place the order directing the dismissal of the bill *is* inconsistent with the opinion of this court as we have shown, and in the next place the Supreme Court of Illinois did not pretend in its remanding order to exercise any discretion whatever. Its order recites that the cause came on to be heard on the motion of the Farmers' Loan and Trust Company to reverse the judgment of the Appellate Court and the decree of the Superior Court and remand the cause, and it appearing that the Supreme Court of the United States did enter a certain order (here follows the mandate of this court *in hæc verba*), therefore *in obedience to said mandate and in compliance therewith*, it is considered by the court that the judgment of the Appellate Court and the decree of the Superior Court in this behalf rendered be reversed, annulled, set aside and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to dismiss the bill. No opinion whatever was rendered by the court and it simply did what it considered a ministerial act in entering the remanding order. It simply states that in obedience to the mandate and in compliance therewith the cause is remanded with directions to dismiss the bill.

In view of what we regard as good reasons for our position, the merits of this case are not properly before the court on this motion, and in view also of the limited time at our disposal, we have not submitted to the court the full argument we think necessary to properly present the merits of this controversy. In fact, on this motion we regard it as improper so to do.

We respectfully submit that the motions made by the defendant in error to dismiss the writ of error, to vacate the supersedeas, or to affirm the judgment, should be denied.

Respectfully submitted.

CLARENCE A. KNIGHT,
Attorney for Plaintiff in Error.

Esq.
By ... Stanley for ... Gen.
FILED
MAY 28 1901

Filed May 28, 1901.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE FARMERS LOAN AND TRUST COMPANY et al.,
Defendants in Error.

In Error to the Supreme Court of Illinois.

REPLY TO ADDITIONAL SUGGESTIONS FILED BY THE DEFENDANT IN ERROR ON MOTIONS TO DISMISS OR TO AFFIRM.

CLARENCE A. KNIGHT,
Attorney for Plaintiff in Error.

Rose & Stanley, Printers, 87 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE LAKE STREET ELEVATED RAILROAD COMPANY, *Plaintiff in Error,* vs. **THE FARMERS' LOAN AND TRUST COMPANY et al.,** *Defendants in Error.*	In Error to the Supreme Court of Illinois.

REPLY TO ADDITIONAL SUGGESTIONS FILED BY THE DEFENDANT IN ERROR ON MOTIONS TO DISMISS OR TO AFFIRM.

We have this morning received from counsel for the defendant in error a copy of his additional suggestions upon the motions made by him to dismiss the writ of error or to affirm the judgment of the Supreme Court of Illinois.

It appears that counsel makes objection to the filing of the transcript sent by the clerk of the Supreme Court of Illinois to the clerk of this court, in obedience to the writ of error issued herein. The idea seems to prevail in counsel's mind that this record has been filed and the case

docketed in this court to carry out some ulterior purpose on our part. The facts in relation to the filing of this transcript are as follows:

On May 11th last we mailed to the clerk of this court our appearance for the plaintiff in error in this case and a motion to extend the time to file a brief in opposition to the motion made by the defendant in error to dismiss or to affirm, a copy of which letter is as follows:

"CHICAGO, May 11, 1901.

James H. McKenney, Esq., Clerk of the Supreme Court, Washington, D. C.:

DEAR SIR—I hand you herewith my appearance as counsel for the plaintiff in error in the case of *The Lake Street Elevated Railroad Company, plaintiff in error,* v. *The Farmers' Loan and Trust Company, The American Trust and Savings Bank and The Northern Trust Company, defendants in error.*

The necessity of sending this appearance to you at the present time arises by reason of the following facts: On the 23rd day of April last Justice Brown allowed a writ of error in the above entitled cause, and on the same day the same issued out of your office, together with a citation to the Supreme Court of Illinois. The clerk of the state court was directed to transmit the record within thirty days. On the 4th day of May counsel for the Farmers' Loan and Trust Company served notice upon me that on the 13th day of May they would move the court to dismiss the writ of error or to affirm the judgment. I was given only nine days' notice of this motion, although, under the rules, I am entitled to three weeks' notice. I requested counsel to stipulate for a few days' additional time within which I might prepare and file a brief, but they decline to do so unless I will agree to submit the motion at this time. This I do not care to do. The record has not yet been sent, but will be sent before the thirty days have expired.

I have prepared and hand you herewith a motion, together with proof of service of same, which I would like to have you present to the court at the time Mr. Burry makes his motion on May 13th to dismiss the writ of error,

granting me the time allowed by the rules to present and file my brief in opposition to his motion. This motion, I presume, will be granted as a matter of course.

I also enclose a check for $25.00, the deposit usually required from plaintiffs in error.

I would like to have you let me know at once whether it is necessary to send with the record a bond for costs, and if so will you kindly send me a blank form of the bond required.

Yours very truly,

CLARENCE A. KNIGHT.

Under date of May 15 last the clerk of the Supreme Court advised us that this letter and the enclosures were not received by him until May 14, and that he held the motion and other papers for further direction, which said letter is as follows:

"WASHINGTON, D. C., May 15, 1901.

Clarence A. Knight, Esq., Chicago, Ill.:

DEAR SIR—Yours of the 11th inst. enclosing appearance for plaintiff in error, check for $25.00, motion to extend time to file briefs, and notice of same, in case of *Lake St. Ele. R. R. Co.* v. *Farmers' Loan & Trust Co. et al.*, were received late yesterday afternoon. On Monday, the 13th inst., Mr. Burry filed and docketed on the part of defendants in error a transcript of record in this case, which is No. 669 for Oct. Term, 1900, and submitted motions to vacate the supersedeas or dismiss or affirm therein, and leave was given counsel for plaintiff in error to file briefs in opposition to said motions within 5 days. As already stated, at that time your papers had not been received and consequently your motion for extension of time to file briefs could not be submitted to the court, the time given you to file briefs having been asked for by Mr. Burry in your behalf. I, therefore, hold your motion and the other papers for your further direction.

Yours truly,

JAMES H. MCKENNEY,
Clerk, Supreme Ct., U. S.,
Per W. R. S."

On the 17th of May, in answer to the above letter, we

requested the clerk to hold the appearance and to file the same when the transcript should be sent on, which said letter is as follows:

"CHICAGO, May 17, 1901.

J. H. McKenney, Esq., Clerk of the Supreme Court, Washington, D. C.:

DEAR SIR—Your letter of the 15th inst., advising me that my letter of the 11th inst., enclosing appearance and motion to extend time to file briefs, etc., in *Lake Street Elevated Railroad Company* v. *Farmers' Loan and Trust Company*, is at hand. I do not understand why the motion was not received in time for presenting the same to the court at the time Mr. Burry presented his motion. The letter was mailed here the morning of Saturday and it seems to me it should have reached Washington in time for court on Monday. I presume nothing can be done with the motion as I have sent my brief. Please hold the appearance and appearance fee, $25.00, and file the same when the transcript is sent, which will be within a day or two.

Yours very truly,

CLARENCE A. KNIGHT."

On the 20th of May we received word from the clerk acknowledging ours of the 17th and advising us that the transcript had been that day received by him and that he had, as requested, docketed the case as No. 687 for the October term, which said letter is as follows:

"WASHINTON, D. C., May 20, 1901.

Clarence A. Knight, Esq., Chicago, Ill.:

DEAR SIR—Yours of the 17th inst. received. Transcript of record in case of *Lake St. Ele. R. R. Co.* v. *Farmers' L. & T. Co.* was also received to-day, and I have as requested docketed the case No. 687, for Oct. Term, 1900.

I enclose receipt for amount of deposit.

Yours truly,

JAS. H. MCKENNEY,
Clerk Supreme Ct. U. S.
Per H. C. M.

This is all that passed between us and the clerk regarding

this case, with the exception of a letter on May 16th advising him that we had expressed twenty-five copies of our brief in opposition to the motions of the defendant in error, and requesting him to see that they were placed in the hands of the court, and a letter from the clerk acknowledging receipt of our letter, and advising us that the briefs had been received.

It will be seen that there has been no effort on our part to embarrass the defendant in error in any way whatever. If he has been embarrassed in any way it is owing to his own action in prematurely making his motion to dismiss the writ of error or to affirm the judgment, for which we are not responsible. We assume the clerk in filing the transcript understands the duties of his office, and it will not be necessary to notice counsel's insinuations.

Regarding counsel's suggestions that the case in which the transcript sent by the clerk of the Supreme Court of Illinois has been docketed should be dismissed, we certainly object to that, and we know of no reason why the two cases should be consolidated.

If the motion to dismiss or to affirm is denied, or reserved to the hearing that disposes of the case docketed by the defendant in error. If such an order shall be entered we have no objection to a like order being entered in the case docketed by the plaintiff in error. If any other order than that is entered in the case docketed by the defendant in error, we have no objection to a like order being entered in the case docketed by the plaintiff in error, provided we are not prejudiced by the fact that the transcript filed by the defendant in error is incomplete and such order is not the result of that fact.

Respectfully submitted.

CLARENCE A. KNIGHT,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

No. 669.—October Term, 1900.

The Lake Street Elevated Railroad Company, Plaintiff in Error, *vs.* The Farmers' Loan and Trust Company and others. } In error to the Supreme Court of Illinois.

[May 27, 1901.]

Mr. Justice Shiras delivered the opinion of the Court.

When this cause was before us at October term, 1899, it was determined that the jurisdiction of the Circuit Court of the United States for the Northern District of Illinois had attached, as respected the Lake Street Elevated Railroad Company and its property, before the institution, by the Lake Street Elevated Railroad Company, in the Superior Court of Cook County, Illinois, of a suit involving the same parties and questions as those in the Federal court; and, accordingly, it was held that the decree of injunction granted by the Superior Court and affirmed by the Appellate Court and by the Supreme Court of Illinois, enjoining and restraining the Farmers' Loan and Trust Company from proceeding with its suit in the Circuit Court of the United States, had been improperly granted; and thereupon the judgment of the Supreme Court was reversed, and the cause was remanded to that court for further proceedings not inconsistent with the opinion of this court. (177 U. S. 51, 62.)

In pursuance of the mandate and in conformity with the opinion of this court, the Supreme Court of Illinois, on April 17, 1901, reversed and set aside the judgment of the Appellate Court and the injunction decree of the Superior Court.

This action of the Supreme Court of Illinois was a full compliance with the mandate of this court.

But it is now complained that the Supreme Court went further, and beyond our mandate, in directing the Superior Court to dismiss the bill; and this writ of error was sued out asking us to supervise and reverse the action of the Supreme Court in that respect.

But the Supreme Court, in directing a dismissal of the bill, was in the exercise of its own jurisdiction over the cause pending in the Superior Court of Cook County. Whether it should order that court to suspend action until the Federal court had exhausted its jurisdiction or to dismiss

the bill, leaving the parties to abide by the decree of the court whose jurisdiction had first attached, was for the Supreme Court of Illinois to determine, and as such action in nowise involved any Federal question this court has no jurisdiction to review it.

It cannot be said that, by ordering the dismissal of the bill, the Supreme Court of Illinois passed upon Federal questions involved in the litigation in such a sense as to give this court jurisdiction to review its decree. The record of the case when here before discloses that, so far as Federal rights were concerned, they were asserted by the defendants in the Superior Court, and hence the dismissal of the bill, if it affected such Federal rights at all, was not a decision *against* the parties invoking them, which alone would give us jurisdiction.

The writ of error is *Dismissed.*

True copy.

Test:

Clerk Supreme Court, U. S.